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Practice Arbitration

An Opportunity for Education

J. Noble Braden*

"This is a C. I. F. contract. The price my client agreed to pay covered cost, insurance and freight. The seller took the risk of any increase in freight or insurance rates, and when he attempted to have my client pay the increase in his cost of insurance and freight, he was breaching the contract.

"The contract called for prompt shipment. It was the duty of the seller not only to ship upon the first available steamer, but on the steamer that would arrive first at the port of my client.

"I, therefore, ask you to award to my client damages for the failure to deliver the merchandise under the contract and damages for the failure of the seller to deliver promptly, as provided in that contract, that portion of the merchandise which he did deliver."

Thus the attorney for the claimant made his final plea summing up his client's claim.

This was a practice arbitration, in which the principals and witnesses had testified at some length, setting forth their respective positions regarding a claim for damages for breach of a foreign trade contract. The testimony was realistic because it was based upon an actual dispute previously arbitrated in the tribunals of the American Arbitration Association. The documents and evidence were made available to the participants for study, with the permission of both parties. The participants were students who had been selected several weeks in advance and who had carefully studied the documents and evidence used in the original arbitration in order adequately to portray an arbitration and present the facts upon which a decision could be made.

The audience was a group of students from the Economics Department of a leading university,—all students of foreign trade. They were required to make an award on the basis of the facts which had just been presented to them, thus gaining experi-

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ence as arbitrators, an understanding of the responsibilities of parties and an opportunity to apply the standards and principles of foreign trade which had been taught to them in the previous months.

The scene changes. It is now a Labor Relations Institute, conducted in a leading university under the joint auspices of a labor union and the faculty. A hundred union officials have been receiving instruction through the week on various phases of labor-management relations. It is evening. During the day they heard a lecture on effective labor arbitration. Now they are assembled to watch and listen to a practice arbitration involving two labor grievances. The arbitrator is a distinguished member of the faculty. The participants are students of the Institute, two representing management and two representing labor. They have studied the papers made available to them through the consent of the parties to an actual arbitration. The time available makes it necessary to eliminate witnesses and have one person from each side summarize the testimony that had been given at the actual arbitration. Then followed argument and rebuttal. The first grievance was fully heard. It involved a claim of discriminatory discharge. A recess was called and the audience balloted on what the award should be. The arbitrator reserved his decision. The second grievance was presented; this time, a claim involving job evaluation. The claimant desired to be placed in a higher classification and thus receive increased pay. Again testimony was summarized and argument and rebuttal received; the audience voted again. But this time, the arbitrator while awaiting the counting of the ballots, proceeded to make his award on both grievances and set forth his reasons for reaching the decision.

The director of the presentation then gave a critique of the case as presented, and additional comments were made by members of the faculty attending the presentation. The floor was then opened for questions, answered by the arbitrator, the members of the faculty, and in part, by those who had taken part in the practice arbitration. The interest was great. Finally, long after the meeting was due to close, the chairman had to call a halt and in a brief summary of the matter close the evening session.[1]

These are but two illustrations of a number of methods that have been used in practice arbitration. The field is almost limitless, and through the cooperation of the actual participants in

[1] See Frank Fernbach, *Training for Arbitration*, Arbitration Journal (N.S.), vol. 2, p. 274 (1947).

arbitrations in the tribunals of the Association, case material may be made available for the use of study groups on almost any subject in which controversy arises.

Among the outstanding demonstrations of practice arbitration have been two presentations at the Association of the Bar of the City of New York. Because of the special audience, all practicing lawyers, the presentation went beyond the usual practice arbitration and included scenes of particular interest to lawyers. Among these were: first, the negotiation of the contract and the arbitration clause; second, a proceeding in court on an application to direct a recalcitrant party to arbitrate under the clause; the practice arbitration and a final scene, again in court, showing the procedure to be followed to confirm the award and enter judgment.[1]

It might be well to set forth the technique that has been used in preparing for some of the practice arbitrations in order that others may have a pattern to follow and be encouraged to use this dual method of education.

It is necessary to select a case which has been arbitrated and on which there is sufficient data available for a practice arbitration. The subject matter must be of interest to the group to which the presentation is to be made. Then the permission of both parties must be secured because under the rules of the American Arbitration Association no publicity may be given to any case without the permission of the parties. In some instances full permission is given. In others, the parties require that their names be deleted from the papers before the case may be used. Whatever the restrictions are, they are strictly observed.

In selecting a case, in addition to procuring one suitable to the audience, the file should be as complete as possible; copies of exhibits and briefs, available. It is also exceedingly helpful if the stenographic minutes of the proceeding are on hand. It is well for someone to digest the material and prepare a general summary of the case to be presented. This will make it easier to recruit participants and also, for those arranging for the arbitration to decide whether or not the subject matter is one that will be both useful and acceptable to their particular group. A time schedule is then arranged and if the time permits, a complete cast is chosen: counsel, principals, witnesses, arbitrators and tribunal clerk. Each is given a copy of the summary and a copy of the briefs in order that he may thoroughly acquaint himself with the role which he is to portray.

[1] For a full description, see Irving Kurz, *From Alpha to Omega in Arbitration*, Arbitration Journal (N.S.), vol. 2, p. 84 (1947).

In a practice labor arbitration at Amherst College, the students took the part of principals and witnesses but professionals served as counsel in the case. A leading union lawyer went to Amherst and reviewed the case with his student witnesses at dinner on the night of the presentation and then conducted the arbitration with the same skill and diligence as if it had been an actual arbitration. Management was also represented by professional talent, the labor relations executive of one of the large New England mills conducting the case.

At the Connecticut State Bar Association annual meeting an international trade practice arbitration was presented in which students of Yale Law School acted as attorneys, parties and witnesses.

If sufficient time is allowed, members of the sponsoring group, whether students in a university or members of some trade, industry, or profession may take all the parts necessary for the presentation, but where there are any time limitations on study of the record it would be well to invite the participation, as counsel for each party, of attorneys or representatives who have had considerable experience in arbitration practice and procedure. In all events, it is well that the arbitrator be thoroughly experienced to the end that he may expedite the proceeding, guide the participants by his questioning and at the end, present an intelligent opinion and decision.

The first practice arbitration of which the Association has any record was presented by the New Jersey Society of Certified Public Accountants in 1927. The Arbitration Committee of that Society had secured permission of the parties to an arbitration concerning the dissolution of a partnership to present the case to the Society because one of the arbitrators, an accountant, had been impressed by the speed and flexibility of the arbitration procedure. He also desired to demonstrate to his colleagues of the accounting profession how arbitration might be used by their clients and also how accounting principles are determined and applied in arbitration proceedings. In the actual case and at the practice arbitration before the Society, there was considerable debate on how certain assets of the partnership should be treated in the final accounting. The audience not only had the opportunity to learn of arbitration but also had the benefit of hearing three distinguished members of their profession discuss and decide the accounting principles which governed the decision.

At Yale University Law School a more serious development

of practice arbitration has been undertaken in the seminar on case presentation which has been given each term since the winter of 1946.[1]

As an indication of the widespread interest in practice arbitration, it may be noted that presentations have been made at or in conjunction with many schools and organizations among which were the following:

Amherst College;
Bar Association of the City of New York;
Carnegie Institute of Technology;
Connecticut State Bar Association;
Hudson Shore Labor School;
National Industrial Conference Board;
New Jersey State Society of Certified Public Accountants;
New York Credit Institute;
Pennsylvania State College;
Sales Executives Club;
Southern Methodist University;
Textile Workers Union;
United Steelworkers Union;
University of Wisconsin;
Yale University Law School

The case method of teaching has long been accepted. Visual education was given great impetus by its demonstrated usefulness in training men in the armed forces in the recent war. Audience participation is eagerly sought by radio programs, as is student discussion by educators. Practice arbitration permits all three. It offers an opportunity to educate not only in arbitration practice and procedure but in commerce, accounting, labor relations or any other activity of business in which disputes arise.

The participants must study arbitration practice and procedure in order properly to take part in a practice arbitration. They must also become thoroughly familiar with the customs and usages of whatever trade or profession is involved in the controversy. The study of the record of the actual arbitration proceeding which is to provide the material for the practice arbitration generally leads to further inquiry by the participants into trade practices in order that they may better equip themselves for participation in the practice arbitration.

The audience, on the other hand, sees and hears an actual arbi-

[1] See James Fleming, Jr., *Arbitration Laboratory in Law School*, Arbitration Journal (N.S.), vol. 2, p. 79 (1947).

tration in progress. It then proceeds to exercise its judgment in determining what award shall be made on the facts presented to it. It is influenced in its decision by the type of presentation made, the eloquence of the parties, the effectiveness of the witnesses, as well as by the facts recited. In addition, it weighs all these with the knowledge that it has previously obtained either through instruction or actual experience.

In the critique of the presentation and in the question period, audience and participants have the opportunity to secure clarification of their thinking and obtain accurate information from experienced persons on both the arbitration process and the field of endeavor out of which the controversy originally arose.

Practice arbitration is indeed a many sided opportunity for education.

THE VOICE OF ARBITRATION

AAA Regional Managers were active in several cities: John Eastman, Jr., of Boston, met with a student group of Harvard Law School to discuss the settlement of foreign trade disputes; J. B. Wilson, of Buffalo, answered questions on arbitration at the dinner of the Industrial Relations Association; John F. Sullivan, of Chicago, addressed the Kiwanis Club of the stockyards area on 'The Role of the AAA and the Peaceful Settlement of Labor Disputes'; at New Orleans, Sidney Braufman spoke before the Contractors & Builders Council; in Pittsburgh, Gordon M. Bliss discussed arbitration with the Rotary Club of Uniontown; at San Francisco, F. H. Tuttle presented foreign trade arbitration before the Export Manufacturers Association. . . . Members of AAA Headquarters addressed various groups both on commercial and industrial arbitration: Abraham A. Desser spoke on 'Grievances and Arbitration Procedures'; at the Seattle Chamber of Commerce, the Wilmington Chamber of Commerce, the Junior Chamber of Commerce of Passaic, the Mount Union College in Alliance, Ohio; Joseph S. Murphy at the Economics Forum of St. Peter's College, New Jersey on 'The Attitude of Management and Labor to Arbitration'; at the Industrial Relations Council of Fordham University on 'Recent Cases in Labor Arbitration'; the Laboratory Institute of Fashion Merchandising on 'The Advantages of Trade Arbitration,' and Martin Domke spoke at American University in Washington, D. C. on 'Arbitration of Disputes and Claims in International Trade' and at the Second Annual Institute of Foreign Transportation on 'Settlement of Disputes in International Transportation.'

Research in International Arbitration

Kenneth S. Carlston*

Research implies both aim and method, the setting of a problem and the choice and use of the most appropriate methods for the solution of that problem. Aim and method are in turn conditioned by the field of inquiry; the questions that concern the historical scholar are remote from those that trouble the physical scientist and the tools of the trade of each of them are different. Research, furthermore, assumes the existence, on the part of the researcher, of that quality described by patent courts as "skill in the art." In other words, research takes place in the forefront of technique and knowledge. Mastery of the field of investigation is essential if its domain of knowledge is to be enlarged by research.

Arbitration is a process, a procedure, a function. It is one particular way of settling controversy. It is an art, an institution, and its science concerns the efficacy of its functioning. Research in arbitration is fundamentally conditioned by that fact; its value will depend upon the extent to which it sets for its objective the improvement of the arbitral method as a means for the disposition of controversies. The acclaim which will be accorded its results will depend upon the extent to which they enable the arbitration process to be bettered.

In international arbitration, however, we are confronted by one additional basic fact. States desirous of resorting to arbitration for the solution of their controversies will usually insist that the tribunal of their choosing function as a court of law and on the basis of respect for law, i.e., international law. Only if they specifically direct the tribunal to function as an *amiable compositeur* or to decide *ex aequo et bono* will the tribunal be justified in proceeding otherwise than as a court of law. An attempt to explore the implications of that fact has been made by the author in his volume, *The Process of International Arbitration,* and is the subject of a very considerable literature.

There still remains relatively untouched the field of inquiry concerned with the improvement of the functioning of the proc-

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ess of international arbitration. One aspect of the problem has been very thoroughly and soundly explored in *Evidence before International Tribunals* by D. V. Sandifer. Some basic questions of procedural reform are also examined by the author in the first chapter of the text cited in the preceding paragraph. Some suggestions and observations have also been made by Nielsen, Witenberg and others. These are but the first steps in the development of a true science of international arbitration. The development of that science should be the first concern of research in international arbitration today.

Yet at the outset of their work researchers in this field are immediately struck with the highly unscientific organization of their materials. The American lawyer has at his hand the American Digest System and other comprehensive indexes of cases. The English lawyer has his English and Empire Digest. But the worker in the field of international arbitration has only the card index of one of our great international law libraries to chart his journey into the unknown. Our international lawyers must therefore make a concerted effort to organize and index the applicable arbitral precedents. Georg Schwarzenberger in his *International Law as Applied by International Courts and Tribunals* sees the problem but its solution is beyond his own unaided efforts, as he himself acknowledges, for he does not hold his text out as a comprehensive digest of international decisions but only as a textbook for students.

A second step which should be taken is to establish a procedure for the deposit with the United Nations, and the publication by that body, of all judgments and opinions rendered by international arbitral tribunals. At present we must rely on the sporadic printing of these decisions by the nations involved in the particular dispute or by learned societies in the periodic publications, such as the invaluable documents section of the American Journal of International Law. The publication of these decisions must be regularized and their accessibility to the scholars of all nations ensured. In addition, it would be most helpful if a procedure could be established through the United Nations for the publication of briefs, arguments and pleadings in all such cases. These are the raw material for the fashioning of a science of international arbitration. Such a collection would furnish an invaluable adjunct to the work of developing and codifying international law. To make it available for use by the scholars of all nations would be a simple, inexpensive step which can and should be taken without delay.

The Habit of International Legal Action

Pitman B. Potter*

In view of developments in organized international activity in recent days such as the United Nations, its many specialized agencies, and affiliated organs, and developments in Pan-American cooperation, an inquiry concerning progress in the oldest form of international organization—arbitration or judicial settlement—is in order. What has happened in the field of legal procedure in the world community?

The answer begins with the observation that in the area of *structural reform* much has been accomplished. Following the establishment of the Permanent Court of Arbitration at The Hague in 1899 (revised in 1907), the Permanent Court of International Justice was set up under the League of Nations in 1921. Now the International Court of Justice takes its place under the United Nations. At the same time, however, nothing has been done to satisfy the demands for regional courts on a lower level; the international judicial structure remains very fragmentary and slender.

Procedure before these high courts has been greatly improved since 1899. Once a case between two states gets before one of these tribunals it can be handled, subject to reservations noted below, with a fair degree of satisfaction.

The decisive question to ask relates to the problem of the submission of cases by states. Has there been any noticeable increase in the number of cases submitted to judicial settlement before international tribunals in recent years? The answer is no. While the P.C.I.J. was much more active than the old Hague Court of Arbitration, experience must yet tell us to what extent the habit of adjudication will grow under the I.C.J. To date it has not been very busy.

The paradox of the situation under which important world courts have few cases resides in the fact that during the period 1920-1935 many agreements were concluded whereby either party could bring the other before the P.C.I.J. (now the I.C.J.). The

* Dean, Graduate Division of the School of Social Sciences and Public Affairs of The American University in Washington, D. C.—Reprint from World Affairs, Spring, 1948.

existence of world courts fills a long standing demand of advocates of international adjudication, yet the increase in cases submitted indicates the undeveloped state of the habit of legal recourse in international affairs, in the legal structure and operation of the world community. Why do national states not submit cases to international courts?

The present writer, noting this contradiction, recently surveyed and analyzed the opinions of some fifty jurists, diplomats, and administrative officials of different countries and arrived at these arresting conclusions:

1. The failure of governments to take advantage of the right to bring other governments into court results from conscious choice, not inadvertence.
2. Disinclination to offend a fellow-government tends to prevent the growth of the habit of submission.
3. Uncertainty over the outcome exists because of the character of existing international law.
4. Uncertainty about the issues to be decided and the points to be proved in any international adjudication exists because of the absence of those standardized forms of action and pleading which mold litigation in the national or local jurisdiction into manageable forms.

One state having a grievance against another state, even if authorized to bring the latter into court, hesitates to do so because it is uncertain about the reaction of its opponent, uncertain about the substance of the law defining its rights, and uncertain above all as to how to formulate its complaints, demands, or other pleadings so as to bring out its true position and its just rights.

International habits grow slowly; substantive law grows slowly too—even when implemented by deliberate and competent legislation. Forms of action and pleading grow most slowly of all. Available international forms may, indeed, be supplemented by borrowing and analogy from other legal areas much in the way that the United States Supreme Court, faced with a similar situation, drew upon common Anglo-American forms of action to facilitate litigation among the States of the Union under the new Constitution of 1789.

To further the habit of international litigation and the submission of disputes for legal settlement, law in the world community needs the implementation of precise pleadings, standards of practice, clearly defined forms of action, and a wide-spread familiarity with procedures on the international level. The re-

statement of substantive international law must go hand-in-hand with the perfection of adjectival law. The habit of legal action will grow with the perfection of international courts as instrumentalities, and with the spreading of understanding of practice and procedure in these courts.

Winston Churchill at the Congress of Europe in the Hague, on May 7, 1948: "King Henry of Navarre, Henry IV of France, with his great Minister, M. Sully, between the years of 1600 and 1607 labored to set up a permanent committee representing the fifteen—now we are sixteen—leading Christian States of Europe. This body was to act as an arbitrator on all questions concerning religious conflict, national frontiers, internal disturbance and common action against any danger from the east—which in those days meant the Turks. This he called the Grand Design. After this long passage of time we are the servants of the Grand Design." . . . *Intergovernmental Maritime Consultative Organization* recently set up under the United Nations Maritime Conference in Geneva provides in Part XV of the Convention of March 6, 1948 for the settlement of controversies concerning the interpretation and application of the Convention by the organs of the Organization or "in such other manner as the parties to the dispute may agree," whereas any legal question not so settled shall be referred to the International Court of Justice for an Advisory Opinion. . . . *International Court of Justice* issued its first Advisory Opinion, in a nine-to-six decision, that applications from countries for United Nations membership should be passed upon only in the light of requirements under the UN Charter, without any political bargaining. . . . *International Refugee Organization* established review board for appeals from refugees declared ineligible for protection. . . . *International Arbitration and the Abolition of War* will be discussed by W. Harvey Moore, K. C., at the forthcoming Brussels Conference of the International Law Association where the French Branch will also present a report on Commercial Arbitration.

Arbitration under the Marshall Plan. The Economic Cooperation Act of April 3, 1948 provides in its art. 115 c (10) that the participating countries will agree to submit "for the decision of the International Court of Justice or of any arbitral tribunal mutually agreed upon any case espoused by the United States Government involving compensation of a national of the United States for governmental measures affecting his property rights." Said the Legal Adviser to the U. S. State Department, in an address before the American Society of International Law on April 23, 1948: "It can be expected that difficult problems will arise in connection with decisions which must be made by this Government as to which cases it will espouse under this provision and the extent to which we will require of citizens a demonstration that the local remedies are inadequate."

The Little Assembly of the United Nations

PHILIP C. JESSUP*

PACIFIC SETTLEMENT OF DISPUTES

In its resolution establishing the Interim Committee, the General Assembly gave it another function. This function was to consider and report to the General Assembly on "methods to be adopted to give effect to that part of Article 11 (1), which deals with the general principles of cooperation in the maintenance of international peace and security, and to that part of Article 13 (1*a*), which deals with the promotion of international cooperation in the political field." Although the Charter under article 24 confers on the Security Council "primary responsibility for the maintenance of international peace and security," the General Assembly is also given important powers and responsibilities in this field. As the discussions in the Little Assembly have developed, attention under this topic has so far been focused on the problem of improving the means for the peaceful settlement of international disputes. For instance, the United States, jointly with China, has submitted proposals looking toward the establishment of panels from which commissions of investigation or commissions of conciliation could be formed either by the parties or by the Security Council or by the General Assembly. The same joint proposal has suggested that the General Assembly might prepare something in the nature of a code of civil procedure which would indicate to states the various procedures which might most conveniently be utilized for the settlement of disputes. You will recall that article 33 of the Charter calls upon the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, "first of all" to seek a solution by peaceful means of their own choice. There seems to be developing a tendency to disregard this "first of all" injunction and for states to turn immediately to the Security Council or to the General Assembly. It would certainly be undesirable to close the doors of these great organs to disputing states. On the other hand, there is a great deal of political wisdom in this provision of the Charter because it recognizes that when disputes are aired in either the Security Council or

* Extract from an address of the Deputy U. S. Representative on the Interim Committee of the United Nations, reprinted from Department of State Bulletin of May 2, 1948, p. 576.

the General Assembly, the positions of the disputant states are apt to become crystallized, and at times it may be more difficult for them to reach agreement. In many situations, the preliminary use of less public and less dramatic means of settlement may be of very great value. All angles of this situation and all possible methods of meeting the problem are now being explored by a subcommittee of the Little Assembly. Various delegations other than those of the United States and China have submitted specific suggestions and work is going forward.

It is important to bear in mind in this connection that the Charter is a constitutional document and not an elaborate bit of legislation designed to cover every contingency. The Charter lays down the main principles and establishes the main machinery and then, like all intelligent constitutional instruments, leaves it to the course of development to work out the detail. This is the first time that any steps have been taken to explore the details of this field. You will remember that the General Assembly in 1946 undertook to begin another task which was entrusted to it by article 13, (1*a*), namely, the encouragement of the progressive development of international law and its codification. It appointed a committee to recommend methods, and as a result of the report of that committee it has decided to establish a permanent International Law Commission. Similarly, under article 11 work has been begun in connection with disarmament. But, prior to the establishment of the Little Assembly, nothing had been done of comparable character in connection with the General Assembly's broad role in the political field and in connection with the general principles of cooperation in the maintenance of international peace and security.

One should not expect that the Little Assembly will now provide the final answers. If one looks back over the history of the League of Nations one will find that there was a continuing series of studies ranging from 1920 up through the early 1930's, all designed to elaborate the means of pacific settlement of disputes. Those efforts resulted in the drafting of a number of important and valuable documents, such as the General Act of Geneva of 1928. This League of Nations experience is being restudied and re-evaluated. So is the comparable experience in the Inter-American system which is now being re-examined at the Bogotá conference. The Little Assembly can only break ground for a continuation of studies which ought to go on over a great many years. Some people seem to think that it is futile to start studies of this kind now in the midst of a period of political tension.

The same objection was raised to the first steps taken in regard to the progressive development and codification of international law. The answer to these objections is that when one deals with long-range problems of this character, it is never too soon to begin. Moreover, the very fact that states are embarking on work involving a concentration on peace may make a contribution to the relief of the tension which superficially seems to make the work itself inappropriate.

Recourse to Arbitral Tribunals Alternative to International Court of Justice. International agreements sometimes provide that recourse to the International Court for the settlement of a dispute shall be had "if it cannot be settled by negotiation or other means" (art. 19, Trusteeship Agreement for Tanganyika under United Kingdom Administration), or "unless the parties agree to another mode of settlement" (Treaty between the United Kingdom and the Provisional Government of Burma; British and French Draft-Conventions on Freedom of Information, Final Act of the United Nations Conference at Geneva, Switzerland, April 21, 1948). The Chinese-Philippine Treaty of Amity of April 18, 1947 provides in its art. 2: "Should any dispute arise between the two high contracting parties which cannot satisfactorily be adjusted by diplomacy, or through mediation or arbitration, the parties shall not use force for settlement, but shall refer the dispute to the International Court of Justice for final adjudication."

Techniques for the Settlement of Inter-Custodian Disputes

Malcolm S. Mason*

The disposition of German enemy external assets was allocated by the Paris Reparations Agreement to the signatory country within whose jurisdiction they are found. In order to resolve conflicts of jurisdiction, a draft agreement has been prepared under the auspices of the Inter-Allied Reparations Agency ("IARA") at Brussels, created under the Paris Agreement (see ARBITRATION JOURNAL, vol. 2, p. 309). The proposed agreement provides for the appropriate allocation of various types of property. It has been signed by the Netherlands, Canada, Belgium, and the United States. Those signatures, when appropriately ratified, will be sufficient to bring the agreement into effect. It is hoped that all eighteen countries that are members of IARA will ultimately enter into this agreement or analogous agreements.

The proposed IARA agreement involves two novel techniques for the settlement of difficult cases. The first is the establishment of special committees to deal with complex cases. The second is the establishment of a permanent panel of conciliators with authority to make binding recommendations (see ARBITRATION JOURNAL, vol. 2, pp. 309, 351).

Certain of the cases in which inter-custodian conflicts arise are extremely complex. A chart of the *Stinnes* interests, for example, shows over 100 companies in over a dozen countries as well as in Germany. Any one of these properties may be owned through a channel of ownership which in some instances passes through four or five countries. *Vereinigte Stahlwerke* has subsidiaries in some four or five IARA countries and in turn is directly or indirectly a subsidiary of several of its own subsidiaries. There are moreover extremely intricate stockholding and debtor-creditor relations amongst the affiliates. The agreement provides step-by-step procedure assuring a definitive solution to each case. More than this is required, however, to assure a prac-

* Chief, Legal Branch, Office of Alien Property, Department of Justice.—The views expressed in this article are the author's and do not necessarily reflect those of the Department of Justice.

tical approach to the problem of complex enterprises. In such cases, it is accordingly provided that a special committee be set up. Each country interested in a particular case would be represented on the committee set up for that case. The committee is to make recommendations for a practical solution of the case. The committee should, of course, be guided by the principles underlying the agreement. Its powers are not set down, however, and the committee will afford an opportunity for the elimination of non-essential complications through the rough give and take of the discussion table. Equally important, the committee will be able to adopt flexible administrative techniques to meet the special problems of each case. For example, an extremely complex case may sometimes be best solved by the establishment of a joint liquidating trusteeship. The committee may draft the terms of the trusteeship so as to protect special interests which may be found present and entitled to recognition. Again it may be found more in the interest of the parties that the enterprise be continued rather than liquidated and they may agree that an international holding corporation of some kind be established in which the various interested countries will accept equity or creditor positions in lieu of their claims to the underlying assets. Such a holding corporation may prove an effective device for settling complex conflicts. At the same time, it may afford an interesting experiment in the establishment of economic links directly among the United Nations in fields in which such links were formerly with Germany. The usefulness of the committees for complex cases is as yet untested but it may prove to be a novel and important development in international relations.

The conciliation procedure of the agreement also has distinctive aspects. A permanent panel of conciliators who will make their own procedural rules is to be elected from nominees designated by the parties. This tends to assure the selection of qualified independent expert conciliators. It is a procedure familiar in the case of an arbitral tribunal but unusual in the case of conciliation. The range of powers of the conciliators is not defined but, like the powers of the special committees for complex cases referred to above, they are left flexible to fit the situations that may arise. Certain matters are reserved from the scope of conciliation. These are: whether in the opinion of any country its national security requires retention of property which would otherwise be released against a reimbursement and whether extension of the time for payment of reimbursement shall be permitted beyond seven years after the date of the release. One

member of the panel will be assigned to any particular dispute not resolved within a reasonable time by negotiation. The services of the conciliators will presumably be available also in the negotiation stage of the settlement of any dispute before formal conciliation procedures are resorted to. This would be a matter for mutual agreement of the parties. If agreed upon, the conciliator would have the traditional function of trying to bring the parties together by investigation and report of the facts, development of possible compromises or other solutions, and persuasion of both parties. Once the formal conciliation procedure is invoked, however, the conciliator is authorized to make a final recommendation which will be binding on the parties. This provision is so untraditional as to raise some question whether the term "conciliation" is properly used at all. Traditionally, an arbitrator makes a binding determination while a conciliator's recommendation is not binding.

An example from another field may help to make clear the distinction involved. A boundary dispute between nations may turn on questions of fact—discovery, exploration, occupation, the authenticity of old maps and grants—and on questions of law applicable to those facts. Such questions can be submitted to an arbitral tribunal or international court for a decision. The tribunal will determine the facts and apply its views of appropriate international law. Its decision will normally be binding. A different approach to the settlement of a boundary dispute would take into consideration the ethnic relations of the people living in the area, their economic relations, needs for access to ports and the like, the military defensibility of possible boundary lines and so on. These are not questions to which there are right and wrong answers but only more or less skillful, more or less imaginative solutions. Questions of this sort are ordinarily submitted to a conciliator rather than an arbitrator but the recommendation of the conciliator is traditionally not binding. When a matter is submitted on terms of reference permitting so broad a range of consideration, parties are usually not willing to commit themselves in advance to accept the recommendation of the referee. The undertaking to be bound by the conciliator's solution is a striking and promising innovation of the agreement.

Although, under the agreement, the conciliator's recommendation is binding, he is not required to decide which of the parties to a dispute is correct. His function accordingly is not judicial in nature. He is required to find a solution which is in his judgment the best possible solution in the spirit of the agreement.

His function is thus rather administrative than judicial. He may invent new techniques for the solution of new problems. Experience shows that many disputes which seem very real to the parties but actually are verbal arise from a faulty statement of the issues and may be made to disappear through the adoption of a different administrative approach to the problem. Often, disputes arising out of head-on collision between two conflicting interpretations of a legal document may be eliminated by finding a new plane of agreement on which the real interests of both parties are served without conflict. The procedure set up by this agreement challenges the ingenuity of the conciliator to find such bases for genuine reconciliation. The future of this method of the amicable settlement of international disputes is attended with a special interest because it represents a new development in international law consistent with the spirit of American initiatives in this area. Unlike accepted conceptions of arbitration it calls upon the conciliators to formulate solutions rather than to make decisions but unlike accepted conceptions of conciliation the solution formulated is binding upon the parties.

Appeal Board on Export Controls was established by the Office of International Trade of the Department of Commerce to provide for a proceeding whereby exporters may apply for a review of any rejection of licenses without due cause or unjust refusal of a request for extension or transfer of licenses. . . . Army Exchange Service has arranged with its insurance carriers for use of arbitration under AAA clause in accident claims brought by civilian employees of the Service. . . . National Association of Wool Manufacturers, in its standard form of Sales Yarn Contract, refers controversies relating to weight and moisture content to U. S. Testing Co., Inc., and all other controversies to arbitration under AAA Rules. . . . Uniform Contract Forms recently adopted likewise refer to arbitration under AAA Rules, as the Basic Trade Provisions of the National Retail Dry Goods Association, the Uniform Sales Form of the Upholstery and Drapery Fabric Manufacturers Association, the Order Blanks of the Clothing Manufacturing Association of the United States of America. . . . Arbitration machinery has been set up by the New England Shoe & Leather Association and the National Association of Shoe Chain Stores to settle trade controversies in the shoe industry. . . . Edgar Malmstrom of the Svenska Dagbladet informs us that the telephone company L. M. Ericsson, Stockholm and the Czechoslovakian authorities settled compensation claims in connection with the nationalization of Swedish properties in Czechoslovakia.

International Transportation Disputes*

I. Specific problems of the settlement of international transportation controversies. The role of governments as parties to international conventions; transport operation under governmental regulation of rates and services.

II. Previous methods of settlement as used within the framework of the Union of International Transport by Rail,[1] under the Universal Postal Convention,[2] and the Postal Union of the Americas and Spain.[3]

III. Air Transport Disputes: *Domestic:* Air Transport Rules of Arbitration, established in 1939 by the Air Transportation Association of America;[4] *International:* International Air Transport Association; *Intergovernmental:* International Civil Aviation Organization in Montreal, Canada,[5] and bilateral Air Transport Agreements providing for advisory reports by arbitrators under the International Civil Aviation Organization.[6]

IV. Recent developments: The Transport and Communications Commission established by the Economic and Social Council of the United Nations;[7] The Convention of the Intergovernmental Maritime Consultative Organization, of March 6, 1948.[8]

V. Methods of settlement: Conciliation, mediation, fact-find-

* Outline of a lecture delivered by Martin Domke on May 24, 1948 at the Second Annual Foreign Transportation Institute, The American University, Washington, D. C.

[1] Manley O. Hudson and Louis B. Sohn. *Fifty Years of Arbitration in the Union of International Transport by Rail*, American Journal of International Law vol. 37 (1943) p. 597.

[2] Martin Domke, *Arbitration between the Netherlands and U. S. Postal Administration*, American Journal of International Law vol. 40 (1946) p. 817.

[3] Art. 20 of the Rio de Janeiro Convention of September 25, 1946, Treaties and other International Acts Series 1680.

[4] Howard C. Westwood: *Air Transport Rules of Arbitration*, Journal of Air Law and Commerce vol. 11 (1940) p. 99.

[5] John C. Cooper, *New Problems of International Civil Aviation Arbitral Procedure*, Arbitration Journal (N. S.) vol. 2 (1947) p. 119; Rules governing the Settlement of Differences between States, published *ibidem* p. 275.

[6] Air Transport Agreement betwen U. S. and Italy of February 6, 1948, Documents and State Papers (U. S. Dept. State) vol. 1 (1948) p. 112.

[7] United Nations Department of Public Information, Research Section, Background Paper No. 35, of March 5, 1948.

[8] Department of State Bulletin vol. 18 (1948) p. 499.

ing, arbitration and judicial settlement; compulsory and voluntary arbitration.

VI. Modern principles and standards of settlement-of-disputes: policy of self-regulation; machinery within the framework of the controlling body; appeal from executive decisions; time limits for procedure; maintenance of panels of experts as arbitrators and fact-finders; enforcement of final decisions.

VII. Experiences in the practice of foreign trade arbitration. The importance of Rules and Procedures.[9]

VIII. Machinery for the settlement of international transportation disputes. The Havana Charter for an International Trade Organization of March 24, 1948, art. 53.[10] Coordination under the auspices of the Economic and Social Council of the United Nations.

International Civil Aviation 1945-1948. Disputes on international civil aviation matters are to be submitted to the Council of the International Civil Aviation Organization in Montreal. Said the Representative of the United States to the Organization in his recent report: * "The Bermuda type bilateral agreements governing air transport rights between nations, of which a considerable number are now in effect, provide for submitting disputes on traffic practices to the Council. It is, therefore, possible that this function of the Council will be exercised to some extent in the future. However, the Council, while well suited to serve as a legislative body, is not so well suited to act as a judicial body. The individuals who serve on the Council are representatives of the member states and so are subject to instructions in casting their votes. Therefore, a judicial decision by the Council might be merely a reflection of political forces. The appointment of *ad hoc* arbitral tribunals to settle disputes between member states would seem to provide the best solution of this problem."

The **N. Y. Rent Control Laws** were again amended on **March 31, 1948** by Chapters 676 and 677 of the Laws of 1948, applying in Sections 16 and 15 respectively the Arbitration Statute (Article 84 of the Civil Practice Act) to any controversy submitted to arbitration pursuant to the Rent Control Laws. It is further provided: "Neither the oath of any arbitrator, nor any hearing provided for under such article shall be waived, nor shall any person act as any such arbitrator who directly or indirectly in any way shall be connected or associated in interest or otherwise with the landlord or the tenant, and no arbitration agreement shall be submitted to the Supreme Court unless the application be accompanied by an affidavit of the arbitrator or arbitrators showing strict compliance with this requirement and by a transcript of the minutes of such hearing."

[9] Frances Kellor: *American Arbitration, Its History, Functions and Achievements* (Harper & Brothers, N. Y. 1948).

[10] United Nations Conference on Trade and Employment. Final Act and Related Documents, p. 37.

* Department of State Publ. 3131, p. 39.

Chinese-American Trade Arbitration

Early in 1945, the American Arbitration Association, at the suggestion of the U. S. Department of State, submitted a memorandum recommending the establishment of a Sino-American Arbitration Commission to facilitate the settlement of trade controversies between Chinese and Americans. The proposals presented through official channels to the Chinese Government found the latter's approval. A delegation of leading Chinese headed by Hon. Li Ming, Chairman of the Board of the Chekiang Industrial Bank, established a Joint Organization Committee with American businessmen.

The Chinese Ministry of Economics then entrusted the National Associated Chambers of Commerce of China with the task of organizing a China National Trade Arbitration Association. Yang Shu-jen, the Acting Head of the Foreign Trade Division of the Ministry of Economics, stated that this Association was organized primarily to serve as a Chinese unit of the forthcoming Sino-American Arbitration Commission and not for arbitraton of local disputes between Chinese Parties. The By-Laws of the Chinese Association state as its objectives "to unite the industrial, commercial and occupational groups in effecting compromises, in discouraging lawsuits, and in arbitrating commercial disputes." The mission of the Association is further stated in art. 5 as: "(1) To promote compromise and arbitration in matters of commercial disputes and to discourage lawsuits; (2) To urge the adoption of contract with rules for arbitration printed thereon; (3) To invite industrial, commercial and occupational specialists to act as arbitrators; (4) To fix arbitration procedures; (5) To unite the people's arbitration bodies of different countries for arbitrating any international commercial disputes; (6) To make suggestions to the government for the promulgation of practical arbitration acts."

The present organization and activities of the new Chinese Association, with offices in 103 KiuKiang Road in Shanghai, are being confined to Shanghai, Units of the Association and of the forthcoming Sino-American Arbitration Commission may later be established in major cities of China at the initiative and suggestion of interested organizations. We are happy to present an outline of arbitration rules received from Dr. Wei Wen-Han.

China Trade Arbitration Association

Wei Wen-Han*

This Association was sponsored by eleven major industrial, commercial and professional organizations in China, many of

* Secretary-General, China Trade Arbitration Association.

which are of national scale, including organizations such as:—

China National Federation of the Chambers of Commerce
China National Textile Manufacturers' Association
National Association of Shipowners
National Federation of Bankers' Association
National Federation of Native Bankers' Guild
National Federation of the Chinese Industries
National Federation of Builders' Guild
Foreign Trade Association of China
National Chartered Public Accountants' Association
Federation of Insurance Association of China
Shanghai Lawyers' Association.

The inaugural ceremony was held on February 11th, 1948, in Shanghai with articles of incorporation passed and the Board of Directors, Controllers and Officers duly elected. Mr. Wang Hsiao Lai and Dr. Wei Wen-Han were respectively elected as the Chairman of the Board of Directors and the Secretary General. Mr. Wang has been an outstanding leader in the industrial and commercial fields in Shanghai for a great number of years, and is now the Chairman of the China National Federation of the Chambers of Commerce. Dr. Wei received his Doctor's Degree of Law from the University of Chicago, U. S. A., and practised law in Shanghai for about 15 years, and is now the President of Hai Ying Steamship Co. Many of the Directors are prominent in industrial and commercial fields.

This Association will commence from June 18th, 1948, to arbitrate commercial disputes. A panel of 29 arbitrators has already been appointed from men of different fields, including such men as, Mr. Li Ming, President of the Chekiang Industrial Bank, and Chief Delegate who made the initial contact with the American Arbitration Association on behalf of the Chinese Government; Mr. Hsu Hseuh Yu, General Manager of the China Merchants Steamship Navigation Co.; Mr. Su Yung Chang, General Manager of the China Textile Industries Incorporate; Mr. Y. B. Kiang and Dr. Chen Ding Sai, both prominent lawyers in Shanghai, and Mr. Yulin Hsi, a very noted chartered accountant.

This Association, although still in its infancy stage, has a historical background, traced up to two years ago, when the Chinese Government was first approached by the State Department of United States of America, to appoint a delegation to go into discussion with the American Arbitration Association with a view of organizing an American-Chinese Joint Arbitration Board to attend to the commercial disputes arising between the nationals of two countries. It was through this initiation, under the direction of the Chinese Government, particularly through the Ministries of Economics and

Social Affairs, that this organization was finally brought into existence as mentioned above. Lately, this organization has already communicated by correspondence directly with the American Arbitration Association discussing the possibilities of organizing such a joint board. This Association has also two special committees:

a) Committee for the study of arbitration laws.
b) Committee for the standardization of commercial agreements with the view of inserting a suitable arbitration clause in the agreement.

Hereunder are 2 sets of Regulations for Governing the Appointment of Arbitrators and the Procedure of Arbitration.

REGULATION GOVERNING THE APPOINTMENT OF ARBITRATORS

ARTICLE 1. This regulation is drawn according to the stipulations of Article 22 of the Regulation governing the Organization of the China Trade Arbitration Association.

ARTICLE 2. The arbitrators shall be in number between 25 to 35 to be appointed by the Board of Directors from amongst those engaged in industrial and commercial enterprises, professional men, or experts of different fields. Temporary arbitrators may be appointed, when occasion deems necessary.

ARTICLE 3. There shall be a Chairman and one or two associated chairmen appointed from amongst the arbitrators by the Board of Directors.

ARTICLE 4. The Chairman assisted by his associates shall manage the administrative part of the work relating to arbitration. His duties are principally as follows:

1. He shall act as Chairman at the meeting of arbitrators.
2. He shall determine jointly with the executive directors, the distribution of the matters for arbitration.

ARTICLE 5. The duties of an arbitrator shall be as follows:

1. To attend the matters pertaining to reconciliation.
2. To attend the matters pertaining to arbitration.

ARTICLE 6. The position of an arbitrator is an honorary one.

ARTICLE 7. The tenure of an arbitrator shall be one year subject to reappointment.

The tenure of a temporary arbitrator shall expire so soon as the matter specially referred to him for arbitration is disposed of.

ARTICLE 8. If an arbitrator is not able to discharge his duties on account of other business or matters, he may be replaced by another arbitrator to be appointed by the Board of Directors.

ARTICLE 9. This regulation shall take effect after adoption by the Board of Directors of this Association. Similar procedure shall be applied upon revision.

PROCEDURE OF ARBITRATION

ARTICLE 1. Any party to a commercial dispute may apply to this Association for arbitration.

ARTICLE 2. The Applicant should fill an arbitration application form for submission to this Association.

ARTICLE 3. If the Applicants are both parties to a dispute, this Association

may use its discretion to proceed either firstly by reconciliation or directly by arbitration.

If the Applicant is a singular party to a dispute, this Association may proceed by reconciliation only.

ARTICLE 4. Disputes calling for arbitration shall be concluded within a period of two months and the award thereto shall be delivered to both parties. This period may be extended if the dispute is complicated and cannot be concluded within the prescribed time.

ARTICLE 5. The dispute calling for arbitration shall in principle be handled by a sole arbitrator. When occasion requires, three or five arbitrators may be appointed (by this Association) for the joint disposal of the matter, with one of them to be appointed as the Chairman. The majority votes of the arbitrators shall rule the decision of the case.

ARTICLE 6. The parties to the dispute, after receipt of due notice given by the arbitrator, should appear at the appointed place and time, and should appoint representatives to appear, if the party is not possible to appear in person.

The arbitrator may render an award ex parte, if one party fails to appear without reasonable ground.

ARTICLE 7. The arbitrator may invite witnesses and investigate evidence. If needed, he may also conduct personal tour or engage experts for investigation and determination of evidence thereof.

ARTICLE 8. The award should be made in writing and signed by the arbitrator in charge.

ARTICLE 9. The award between the parties to the dispute shall have the same validity as a final judgment of a law court. If the party, after twice being urged, fails to carry out the obligations as stipulated in the award, this Association may upon the request of the other party, apply to a court of law (having jurisdiction) for an execution of the judgment for their enforcement.

ARTICLE 10. An arbitrator who already took part in the procedure of reconciliation shall not take part in the procedure of arbitration for the same dispute.

ARTICLE 11. This procedure shall take effect upon registration with the competent government authority following the adoption by the Board of Directors of this Association. Upon revision similar procedure shall be applied.

1948 World Arbitration Conference

Arbitration has been exceedingly slow in adopting the Conference method of spreading the knowledge and practice of arbitration. This is particularly true in world affairs and in international commercial and economic relations. Only two such Conferences have been held—one in 1943 in the Western Hemisphere and one in 1946 in Paris. The first was called by the three Western Hemisphere organizations of commercial arbitration on Foreign Trade and Arbitration; the second was called by the International Chamber of Commerce and was limited to representatives of the seven organizations interested in international commercial arbitration. The first Conference was concerned with the general subject of arbitration in foreign trade; the second Conference was concerned primarily with questions of law and procedure.

The 1948 World Arbitration Conference follows the pattern set in 1943, in that it will be general in character with a view to informing business men in the Western Hemisphere of what is taking place in other countries and in the field of international relations and with a view to advising others of the Western Hemisphere policies and programs.

The calling of this second general Conference is based upon two assumptions: the first is that the slow progress made by arbitration over the centuries in ameliorating commerical conflict, and economic controversies is due to the absence of education in arbitration. The second is that arbitration must be taken to the people and become a way of life before it can become vitally effective in international relations. For unless governments and leaders have the impact of an intelligent and active public opinion behind them, arbitration plays but a small role in international relations.

The Conference may serve as a pattern for future Conferences in the United States and elsewhere.

It will open at ten o'clock at the Hotel Pierre on November 11th with a session on *Arbitration in Action,* consisting of reports from various countries or institutions, giving an over-all picture of arbitration in action throughout the world. It will also picture the areas where arbitration is inactive. The morning session will be followed by a luncheon meeting at which Herbert Hoover will be the keynote speaker and over which Spruille Braden will preside. The first World Arbitration Award will be presented at the luncheon to the China Trade Arbitration Association. There will be a general dinner meeting over which Thomas J. Watson will preside. On the following day, November 12, Round Table Conferences will be held on special subjects including education in arbitration, ethics in arbitration and unification of arbitration law.

IMPLEMENTATION OF BRITISH-AMERICAN JOINT ARBITRATION CLAUSE

The use of arbitration clauses in international trade contracts, wherein it is provided that the rule of the cooperating organizations may be used within the territory designated, at the election of the parties, presents a new problem in implementation. This arises particularly when the cooperating organizations have not set up any joint administrative machinery but each proceeds separately within its own territory even though the parties are widely distant in different countries.

The agreement recently concluded between the London Court of Arbitration and the American Arbitration Association offers an illustration. Under this agreement, the following joint clause will be recommended for British-American trade contracts or arrangements:

> "Any controversy or claim arising out of or relating to this contract or breach thereof shall be settled by arbitration. If the arbitration is held in England, it shall be conducted under the Rules of the London Court of Arbitration and the construction, validity and performance of the contract shall be governed by the law of England. If the arbitration is held in the United States, it shall be conducted under the Rules of the American Arbitration Association. Judgment upon the award rendered may be entered in any court having jurisdiction thereof. In the event that the parties have not designated the locale of the arbitration and are unable to agree thereon, either party may apply to the International Law Association in London to decide the locale and its decision shall be accepted by the parties thereto."

What is believed to be the first undertaking to implement such a clause so as to make the arbitration convenient to the parties, at the least risk, has just been agreed to by the cooperating organizations. As it is an experiment to solve what may become a more general problem as these joint clauses expand in use, the text is presented for examination and such suggestions or questions as may occur to *Journal* readers for future clauses.

APPLICATION FOR ARBITRATION

1. *Procedure where the parties have either designated the Locale (or the Venue) of the Arbitration in their contract, or have agreed upon the Locale after the dispute has arisen.*

Application for arbitration under the Joint Clause of the London Court of Arbitration and the American Arbitration Association shall be made to the organisation in whose country the parties have agreed to arbitrate: i.e. the London Court of Arbitration if the parties have agreed to arbitrate in England; the American Arbitration Association if the parties have agreed to arbitrate in the U. S. A.

The organisation receiving the application will notify the other organisation of the application and date thereof, confirming the country in which the parties have agreed to arbitrate.

When the parties have agreed upon the country in which the arbitration is to be held, the organisation in that country will conduct the arbitration in accordance with its Rules.

2. *Procedure where the parties have not designated for Locale (or Venue) of the arbitration in their Contract and have not subsequently been able to agree upon the Locale.*

The organisation receiving the application for arbitration will advise both parties that the place of arbitration is to be determined by the International Law Association and request each party to file within ten days its reasons and arguments on behalf of the country it prefers. If either party fails to file a statement within the time specified, it will be deemed to have agreed to the country indicated by the other party.

The organisation receiving the application will transmit the request for designation of the country to the International Law Association and, in its discretion, may fix the time period within which a decision is required; and may, upon request of the International Law Association, extend such period of time for good cause shown. The period of time so fixed shall take into consideration such factors as the seasonal or perishable nature of the commodity involved, duration of the contract, or other circumstances requiring speed.

The decision of the International Law Association will be transmitted in writing to the organisation filing the papers. It shall forthwith furnish the parties with a copy of the decision and shall send a copy to the other organisation.

The Rules made applicable by the decision, whether those of the London Court of Arbitration or of the American Arbitration Association, shall then be put into effect in the country designated in the decision.

When the Award has been made or when an amicable settlement has been reached by the parties, subsequent to the appointment of an arbitrator, but prior to the making of an Award, the other organisation shall be informed of the fact.

FORM OF APPLICATION

The application for arbitration shall state the nature of the controversy, the amount involved, if any, and the remedy sought. It shall contain the names of the parties and of their legal representatives, if any, and their respective addresses.

Forms for such application are available from the London Court of Arbitration or from the American Arbitration Association, depending upon which organisation is designated to conduct the arbitration under its Rules.

Instructions as to procedure under the Rules will be furnished by the London Court of Arbitration for arbitrations in England and by the American Arbitration Association for arbitrations in the United States as soon as the application has been received and the country is determined.

COST OF ARBITRATION

If held in England, administrative costs will be regulated and assessed under the Rules of the London Court of Arbitration, in accordance with its

Fifth Schedule. If held in the United States, administrative costs will be assessed under the schedule established under Rule IX of the Commercial Arbitration Rules of the American Arbitration Association. Each organisation retains in full any administrative fee so assessed, and is responsible for all funds received under its Rules. Any fee charged by the International Law Association for its services will be included in the administrative cost of the arbitration.

RULES OF PROCEDURE

The Rules of the London Court of Arbitration and the Rules of the American Arbitration Association are obtainable, upon request, from 69 Cannon Street, London E. C. 4, or from 9 Rockefeller Plaza in New York, together with such other information concerning the application for arbitration, laws and practice, as may be available.

Association of Food Distributors. This Association, established since 1906, maintains an effective mechanism for arbitration of any controversy arising out of standard contracts. Its arbitration clause has been inserted in various Uniform Import Contracts, more recently for the Importation of Canned Foods, reading as follows: "Any controversy or claim arising out of or relating to this contract or breach thereof, shall be settled by arbitration in New York, N. Y., by the Association of Food Distributors, Inc., of New York in accordance with its rules, then obtaining, and judgment may be entered upon the award.

Each party to this contract shall be deemed to have consented that any papers, notices or process necessary or proper for the institution or continuation of an arbitration proceeding or for the confirmation of an award and entry of judgment on an award made thereunder, including appeals in connection therewith, may be served upon such party (a) by mail addressed to such party's last known address or (b) by personal service, within or without the state wherein the arbitration is to be held, or within or without the limits of the jurisdiction of the Court having jurisdiction in the premises (whether such party be within or without the United States of America) or (c) where a party to a controversy is not located in the City of New York, by mail or personally as provided in (a) and (b) hereof, upon his agent or broker through whom this contract is made."

International Trade Arbitration Correspondents and Advisors

The outstanding lesson learned in the United States in the last two decades is that without education, arbitration is forgotten, or fails as an effective public service. It is for this reason that arbitration has been taken to the homes, schools, offices, shops and into new avenues of human relations as a way of living in the midst of conflict and controversy.

A second lesson, likewise laboriously learned, is that trade and commercial channels and economic institutions are the natural media for such education and it is through trading peoples that arbitration becomes a household word and a workday instrument.

If then the progress of arbitration in any one country depends upon education, it may be reasonably inferred that education is no less important in international relations as a way for nations to live and work together. The problem of obtaining any universal thought and action upon arbitration is of vital importance to commercial trade. How to get the knowledge of arbitration to the traders of the world, and to the contract makers upon whom the economic well-being of so many people depends, has challenged the attention of the American Arbitration Association to the point of creating an International Business Relations Council as an instrumentality of education.

For the purpose of educating Americans upon what is going on in the world of arbitration, the Council has appointed International Trade Arbitration Correspondents and Advisors in the different trading centers outside of the Western Hemisphere. These Correspondents are nominated by American business men and are then appointed by the Council. These Correspondents are being asked to:

1. Advise the Council of facilities, rules, clauses and procedures of local Chambers of Commerce and trade organizations.
2. Send copies of laws, regulations, rules and other information on the practice of arbitration.
3. Act as liaison officers with American Commercial Attaches or with American Chambers of Commerce in the settlement of disputes. State and Commerce Departments are advising their agencies abroad of the appointment of these Correspondents.
4. Give publicity to arrangements between the American Arbitration Association and agencies and organizations in other countries and facilitate their application.
5. Carry on educational work on American arbitration through native organizations.
6. Send news about conditions or circumstances or regulations that may create commercial disputes.
7. Send names of delegations or persons visiting the United States, to establish arbitration contacts while they are in the United States.
8. Cooperate in arranging for World Arbitration Conferences.

The role of these Correspondents is a dual one. Not only are they re-

quested to keep American business informed as to arbitration history, progress and procedures throughout the world; but they are being trained as civilian outposts and centers of information concerning American arbitration and as interpreters of American business methods and standards. For this purpose they are being furnished with American news and information, *The Arbitration Journal*, Bulletins, Codes of Ethics and other data published by the Association. They are charged with the dissemination of such information among the trading peoples of foreign countries.

At the present time, 140 such Correspondents are actively interested in carrying forth this program in 57 trading centers in 37 countries.

Participation of Lawyers in Arbitration. The Committee on Arbitration of the Association of the Bar of the City of New York published in the *Record* for April 1948 p. 156 the result of research of more than 25,000 cases principally from the files of the American Arbitration Association. In 1926, parties to 36 per cent of the arbitrations were represented by lawyers; the participation had gone up to 70 per cent in 1938. In commercial arbitrations, there was lawyer participation in 80 per cent of the cases in 1942 and in 82 per cent in 1946. In labor aribtrations, the parties were represented by counsel in 84 per cent of the cases in 1942, in 91.7 per cent in 1945, and in 91.6 per cent in 1947. Whereas in commercial cases 21 per cent of the arbitrators are lawyers, in labor cases the percentage is 61. In accident arbitration tribunals of the American Arbitration Association *all* the arbitrators have been lawyers. The Annual Report of the President of the Bar Association (*Record* for June 1948 p. 257) remarked that it is another of the Committee's efforts "to let the Bar see that arbitration is not a device for limiting the usefulness of lawyers—rather the contrary."

International Chamber of Commerce. At a meeting of its Court of Arbitration of April 7, 1948, four new applications for arbitration in Franco-Dutch, Franco-Norwegian, Swiss-Swedish and Anglo-French cases were examined as well as arbitration prospects in Germany and Egypt (World Trade, May 1948, p. 15). From the recent pamphlet of the Chamber "Practical Hints on International Commercial Arbitration" the following may be quoted:

THE INCLUSION IN YOUR FOREIGN CONTRACTS OF THE
"ARBITRATION CLAUSE OF THE I.C.C."
COSTS YOU NOTHING.

ITS OMISSION MAY HAVE TO BE PAID FOR DEARLY.

FROM THE MOMENT A CONTRACT CONTAINING
THIS CLAUSE IS SIGNED
IT IS AN I.C.C. RESPONSIBILITY TO SEE THAT
YOU GET PROMPT AND EFFICIENT SERVICE
IF AND WHEN REQUIRED.

REMEMBER THIS
WHEN DRAWING UP A CONTRACT.

REMEMBER THIS
SHOULD A DISPUTE ARISE.

The Shortage of Venture Arbitration

What is venture arbitration? It is the flow of arbitration into new areas of conflict where its usage is quite unkown or where its reception is problematical.

The sluggishness of arbitration has been a matter of concern over many generations. Arbitration started from the bottom up, through its usage in small mercantile transactions. It was the invention of people then without accessible courts but in whom the passion for justice burned fervently. The need for privacy led it into new avenues of adventure—especially where the near relationship of the disputants or where intimate confidences reposed in them indicated that the controversey had best be decided in a private tribunal. Of such nature were partnership disputes and fiduciary questions.

From this application of arbitration has gradually emerged the concept that arbitration is a dispenser of justice and effectual in the consequent maintenance of tranquillity among members of the community and that it forms an important part of the social economy of a country and may even be regarded as one of the finer tests of civilization.

But under the confusion of two World Wars a real shortage of venture arbitration began. It was gradually shrunk to commercial differences and commodity disputes. But venture arbitration is again looking toward the broad area of human relations and to the problem of how people living and working together can, through their own powers of self-discipline and self-regulation, control or settle the disputes they create. In the United States, arbitration is called an American way of life and signifies the new venture.

But for venture arbitration freedom is necessary. What is needed is an appraisal of arbitration in the fields in which it now functions and an inquiry into new areas of conflict where it might be applied. It is evident that the current sources of venture arbitration are not measuring up to the requirements of the changing conditions of the people of different countries. Restrictive law still hampers its easy flow into new channels; ignorance of its capacities for the building of goodwill, good faith and cooperation still prevail; outworn models of procedure have failed to respond to the new inventions and needs of industry; education lags by the wayside; uncertainty and fear of the unaccustomed still block the flow of venture arbitration.

But the knowledge that there is venture arbitration, ready to be invested for the welfare of people everywhere, is not without merit in a world greatly beset by doubt, conflict and controversy.

The Information Council on Labor Arbitration

Lloyd K. Garrison*

In October of 1947 a group of arbitrators gathered for dinner in New York City as guests of the American Arbitration Association. The meeting had been called for the purpose of exploring what steps the Association might take to utilize the experience and wisdom of its senior arbitrators in raising and fortifying the general level of competence in the field of labor arbitration. The interest expressed in the subject and the many possibilities suggested made further exploration desirable. Recognizing the importance of joint cooperation with all groups whose interests and activities are directed toward the improvement of labor arbitration, a second conference was planned at which members of these various groups could be present.

Accordingly, in January of this year, representatives of the Arbitration Association, the Labor Relations Law Section of the American Bar Association, the Industrial Relations Research Association, and the National Academy of Arbitrators met and considered the possible areas of cooperation between the four groups.

Following a stimulating discussion of problems confronting arbitrators and lawyers in the labor field, this Conference unanimously resolved:

> ". . . that in view of the increasing importance of arbitration as a device for the just and peaceful settlement of labor disputes a study of both immediate and future problems of arbitration with a view to improving the process is both timely and desirable; that to be effective such a study calls for the joint participation of all four of the organizations represented at this conference; that to implement this proposal a steering committee be appointed to formulate a program for the integration of the efforts of these organizations in making such a study; and that the study itself should be undertaken with full realization that it is the public interest at stake which is the paramount consideration."

Since the appointment of the Steering Committee, several

* Member of the New York Bar; Chairman of The Information Council.

meetings have been held, the first of which culminated in a resolution to the effect that ". . . a permanent body be established to be known as THE INFORMATION COUNCIL ON LABOR ARBITRATION and to serve as a clearing house of information on activities of the participating organizations in the field of labor arbitration which may be of common interest; and that appropriate steps be taken to put this resolution in effect."

As an immediate and continuing contribution to the improvement of arbitration, problems which arise in day-to-day practice will be submitted to the respective groups for analysis and advice. The variety of experience and viewpoint that can thus be drawn upon promises solutions that will meet the multiple tests to which labor arbitration is continuously subjected.

Under the following six major headings, the Council will begin its ambitious long-range study program:

1. An authoritative nomenclature defining: impartial chairman, umpire, mediator, conciliator, arbitrator, and all the other terms relating to labor arbitration which are in common but varied use.
2. A study of procedures available for employing the services of an impartial chairman, umpire, mediator, conciliator and arbitrator, together with a study of the advantages and disadvantages of tripartite boards, permanent arbitrators, ad hoc arbitrators, etc.
3. A study of arbitration agreements
   a) to be incorporated in collective bargaining agreements
   b) to determine the terms of collective bargaining agreements, and the criteria which should underlie such determinations.
4. A study of hearing procedures.
5. A study of sanctions, statutory and otherwise, available to implement awards.
6. A study of the acceptance by management and labor of the principle and practice of arbitration and the desirability or otherwise of the publication of awards.

It is the purpose of the Council to meet often enough to provide opportunity for joint consideration of common problems so as to avoid unwitting duplication of efforts but with a clear realization that the Council will not have delegated to it any directive authority over the individual programs of the four member organizations.

Such a vehicle for cooperation was long overdue and it is certain that the joint exchange of information, experience and

opinion among these important groups will tend to improve arbitration, the quality and performance of arbitrators, and ultimately bring about a wider understanding and acceptance of the process by industry and labor.

Among those who participated in the preliminary discussions were: J. N. Braden, Robert P. Brecht, Douglass V. Brown, Edward W. Carter, Alfred A. Colby, David L. Cole, Albert Cornsweet, A. A. Desser, Martin Domke, John Dunlop, James E. Fagan, Nathan P. Feinsinger, Paul Fitzpatrick, Aaron Horvitz, Peter M. Kelliher, Miss Frances Kellor, Theodore W. Kheel, Frederick H. Knight, Richard A. Lester, J. S. Murphy, Rufus Paret, Carl R. Schedler, Ralph T. Seward, Harry Shulman, William E. Simkin, Wesley A. Sturges, George W. Taylor, Victor Davis Werner, and David A. Wolff.

Official delegates representing each of the four participating organizations are being named. Paul Fitzpatrick was elected Executive Secretary of the Council and headquarters were established at 9 Rockefeller Plaza, New York.

Labor Arbitration was the topic of the April 28th meeting of the New York University First Annual Conference on Labor. Jesse Freidin, formerly General Counsel, National War Labor Board, discussed the legal status of labor arbitration, and Frederich H. Bullen, Executive Secretary, New York State Mediation Board, the mediation process. Herman A. Gray, Chairman, Labor Law Section, City Bar Association, spoke about the nature and scope of arbitration and arbitration clauses whereas Lois MacDonald, Professor of Economics of N. Y. University, discussed the selection and tenure of arbitrators. . . . In a course on *Labor Relations and the Taft-Hartley Act*, held by Beryl Harold Levy in New School for Social Research in New York, J. Noble Braden, Tribunal Vice President, AAA, was guest lecturer on "The Role of Arbitration in Labor Disputes," and Charles T. Dowds, Regional Director, National Labor Relations Board, on "The Administration of the Taft-Hartley Act." . . . The *Detroit Bar Association's Management-Labor Committee*, in cooperation with Wayne University's Institute of Industrial Relations, held conference series on arbitration from May 11th to June 8th, under the chairmanship of David A. Wolff; addresses were delivered by Peter Seitz, General Counsel of the Federal Mediation and Conciliation Service, Ralph Seward, Umpire in United Steel Corp. and United Steelworkers of America, on "Problems of Administration under the Labor Contract," Harry Shulman, Umpire in Ford Motor Company and United Automobile Workers—CIO, on "Making the Award," and Irving H. Yackness, Detroit Manager, AAA, on "Presenting the Case."

Extent and Usefulness of Arbitration in Settling Patent Disputes

Anthony William Deller*

In recent years there has been a tendency to include arbitration clauses in patent agreements and to resort to arbitration in settling patent controversies. A variety of reasons appear to be responsible for causing business and industry to select arbitration for settling disputes and differences. These include speed in determining disputes and controversies and the avoidance of formalities and the delay, expense and vexation of ordinary litigation. Inventors concerned with commercializing their inventions and manufacturers interested in developing new products and in protecting their patent rights quite often desire to facilitate settlement of controversies amicably and speedily and to preserve and establish harmonious relations between the parties. For the purpose of clarifying the subject of arbitration as applied to the field of patents, a discussion will be given of the nature of patent disputes and controversies and the extent and usefulness of arbitration in settling such disputes and controversies.

GENERAL CLASSIFICATION OF PATENT CONTROVERSIES

Patent controversies may be broadly classified as follows:

(1) Questions arising from the interpretation and performance of agreements relating to the development of and the manufacture, use and sale of inventions, the payment of royalties under such agreements, and other matters contained in such agreements.

(2) Questions arising from the employer-employee relationship, either under a written or oral agreement, as to rights in inventions made during the course of employment, and the patents obtained on such inventions.

(3) Contests over priority of invention, where two or more inventors claim to have made substantially the same in-

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vention. Such contests usually arise during the course of prosecution of patent applications in the Patent Office, and the issue is there determined through the declaration of an interference, wherein testimony is taken and decision rendered as to who is the first inventor. A further proceeding may be had, by the party dissatisfied with the outcome in the Patent Office, by instituting a suit in equity in a district court under Revised Statutes Section 4915 (U. S. Code, Title 35, §63). This latter procedure is not considered as a technical appeal from the decision in the Patent Office, but is a proceeding *de novo*, and the party seeking relief is not limited to the record made in the Patent Office but may introduce new evidence.

(4) Contests between interfering patents, i.e., patents which claim the same invention. Such a contest is usually decided in a suit under Revised Statutes Section 4918 (U. S. Code, Title 35, §66), wherein the court is given authority to declare either or both of the patents void in whole or in part.

(5) Disputes concerning the validity and infringement of letters patent.

ARBITRATION AT COMMON LAW

In considering the extent and usefulness of arbitration in settling patent controversies, a few general observations should first be made. Arbitration, of course, rests upon mutual agreement of the parties to submit their differences to arbitration, and it is this agreement which may be enforced in the event one of the parties refuses to carry out his undertaking. This agreement may be in the nature of an arbitration clause contained in a patent licensing agreement or other agreement involving inventions and patent rights, and may relate to the settlement of future disputes. Or, after controversy has arisen, the parties may then enter into a specific agreement to submit the controversy to arbitration.

At common law, an agreement to arbitrate was lawful, but was of little practical value, for it was not specifically enforceable, and its breach would support recovery of only nominal damages. (*Meacham v. Jamestown* 211 N. Y. 346; *Munson v. Straits of Dover*, 99 Fed. 787, aff'd 100 Fed. 1005). Although the courts would enforce an award once validly rendered (*Bank of Monroe v. Widner*, 11 Page 52), either party could effectively withdraw from the arbitration before the award (*Finucane v. Rochester*, 190 N. Y. 76).

Before discussing the mechanics of the arbitration procedure itself, the question of the enforceability of patent arbitration agreements and of the proper forum for such enforcement will be considered.

ARBITRATION UNDER STATUTE, FEDERAL AND STATE

We now have a federal arbitration statute (U. S. Code, Title 9). In addition, all the states and Alaska, Hawaii, and District of Columbia likewise have arbitration statutes. In New York, the Arbitration Law is contained in Article 84 of the Civil Practice Act (§§1448-1469). It makes valid, enforceable and irrevocable an agreement to arbitrate, with certain exceptions, relating to capacity of parties and where the controversy arises respecting a claim to an estate in real property, in fee or for life. (C.P.A. §1448). A judgment entered confirming an award in arbitration has the same force and effect as a judgment in court action. (C.P.A. §1466). The federal arbitration statute provides that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of each contract or transaction" shall be valid, irrevocable, and enforceable. (9 U. S. Code, §2).

The first matter to be considered is the enforceability of arbitration agreements relating to patent disputes, and the appropriate forum. In general, it is the rule that the federal courts have exclusive jurisdiction of *cases* arising under the patent laws (U.S. Code, Title 28, §371 (5)) ; but this does not deprive state courts of power to determine *questions* under the patent laws in a *case* not arising under those laws (*Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255; *New Era Electric Range Co. v. Serell*, 252 N.Y. 107), and it is well settled that state courts may try questions of title and may construe and enforce contracts relating to patents (*New Marshall Engine Co. v. Marshall Engine Co.*, 223 U.S. 473). It has also been held that the jurisdiction of a state court, founded on a tort or action on contract, is not defeated because the validity or construction of a patent may be incidentally involved [*Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388; *Respro, Inc. v. Worcester Baking Co.* (Mass.), 197 N.E. 198].

NEW YORK ARBITRATION STATUTE

Under the New York Arbitration Statute, a written provision in a contract to settle by arbitration controversies thereafter

arising between the parties is "valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." The New York statute authorizes the Supreme Court to direct that (1) the arbitration proceed in the manner provided, upon application of a party to the agreement; (2) the appointment of an arbitrator for a party in case he fails to follow the method prescribed by the contract; and (3) the staying of a trial of the action, if suit has been begun.

The enforceability of an agreement to arbitrate a dispute as to patent infringement was involved in a New York case, where a motion was made to confirm the award of an arbitrator. While, generally, the federal courts have exclusive jurisdiction of cases arising under the patent laws, nevertheless, in *Mohawk Mfg. Co., Inc. v. Cavicchi*, 43 USPQ 419 (N.Y. Sup.Ct., N.Y. City, decided May 18, 1938, aff'd 256 App. Div. 1069, aff'd 281 N.Y. 53), the N. Y. Supreme Court confirmed the award. In its decision, the court stated that:

> "Had relief been sought by action rather than by arbitration the Federal courts would have possessed exclusive jurisdiction. The parties had the right, however, to submit their controversy to arbitration rather than to the courts, and no satisfactory reason appears to exist for refusing to take jurisdiction of the motion to confirm the award and for judgment thereon. The merits of the controversy have been determined by the arbitrator and may not be inquired into by the court. In confirming the award and permitting judgment to be entered thereon the court is not determining the controversy between the parties and is therefore not invading the exclusive jurisdiction of the United States courts over cases arising under the patent laws." (Underscoring added.)

FEDERAL ARBITRATION STATUTE

The peculiar wording of the federal arbitration statute limiting it to enumerated subject matter excludes enforcement in the federal courts of agreements relating to the arbitration of patent controversies. The question whether such agreements were enforceable under the federal statute was involved in two cases which came before United States district courts, and in both it was held that such contracts were not contracts "evidencing a transaction involving commerce among the several states or with foreign nations" so as to give the District Court jurisdiction. One of these cases, *In re Cold Metal Process Co.*, 9 F. Supp. 992

(D.C.W.D.Pa., 1935), involved a proceeding by the Cold Metal Process Company for the appointment of arbitrators, pursuant to a contract for an exclusive license to make and sell patented rolling mill equipment, which provided that if the parties thereto were unable to agree upon the payment on account of said license, the matter would be submitted to three arbitrators named therein. Two of the arbitrators named died and the third resigned. The petition prayed the District Court to assume jurisdiction under the provisions of the United States Arbitration Act (9 U.S.C.A. §§1-15), to direct the parties to proceed to arbitration to determine the amount payable to the petitioner and to appoint three arbitrators to act under the contract. The United Engineering & Foundry Company filed its motion to dismiss on the ground that the court was without jurisdiction. In determining the motion, two questions were before the court:

(1) whether the United States Arbitration Act is limited to maritime transactions and to transactions involving interstate commerce, and if so limited.
(2) whether the contract in question involved interstate commerce.

The court held that the Act was limited to maritime transactions and to contracts evidencing a transaction involving commerce, and that the contract for a license under a patent was not a contract involving interstate commerce within the meaning of the Act.

A similar result was reached by the District Court for the District of Delaware in *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F. (2) 184 (D.C.Del., 1930), where the question was raised on a motion by defendant for a stay of an infringement suit brought against it until arbitration of the issues involved had been had, pursuant to the terms of a written agreement between the parties. The agreement embodied the terms of settlement of another and earlier patent suit involving the infringement by the defendant of the same patent which was the basis of the present suit. The arbitration provisions were as follows:

> "It is expressly stipulated and agreed that Second Parties [plaintiffs in this suit] do not regard the grinding compound which First Party [defendant in this suit] is at present manufacturing and selling (a specimen of such compound in a sealed container to be at once furnished Second Parties by First Party) to be an infringement of the aforesaid Letters Patent No. 1,353,197, or any Letters Patent owned by

Second Parties, or any of them, and that Second Parties will make no objection to the continued manufacture and sale of such compound; furthermore, in case First Party should hereafter change its present non-infringing compound to one which Second Parties regard to be an infringement of a patent owned by them, or any of them, the question of validity and infringement shall be determined by arbitration, as hereinafter provided, and at the same time should infringement be held to have occurred, it shall be determined by the same arbitration what royalty shall be paid by First Party in lieu of profits or damages for the manufacture and sale of such compound, and First Party shall have the right to continue such manufacture upon condition that it account for and pay such royalty monthly thereafter.

"In the event the parties hereto shall disagree as to any of the terms or the interpretation thereof, or the respective obligations of the parties hereunder, then such question shall, at the request of either party, be submitted to arbitration in accordance with the provisions of the now existing Statutes of the State of New York in such case made and provided."

The court construed the United States Arbitration Act as limited to controversies involving issues arising in commerce or maritime transactions, and held that the provision in the contract "that the question of validity and infringement shall be determined by arbitration" related to a controversy involving neither commerce nor a maritime transaction, as defined in the Act, and therefore not enforceable under the Federal Act.

STAY OF FEDERAL ACTION PENDING ARBITRATION

Assuming a controversy properly submitted under a state arbitration statute, and yet not enforceable under the Federal Act, it would appear, on the authority of *Shanferoke Coal and Supply Corp. v. Westchester Service Corp.*, 70 F. (2d) 296, C.C.A. 2 (1934), affirmed 293 U.S. 449, that a suit commenced in a Federal Court would be stayed by that court pending submission to arbitration under the state law. In the *Shanferoke* case, where suit was brought in the United States District Court for the Southern District of New York by a citizen of Delaware against a citizen of New York on a contract involving a sale of coal and containing an arbitration clause under the laws of the State of New York, the suit was stayed by the United States District

Court pending submission to arbitration under the state laws. The United States Supreme Court, in affirming the Circuit Court of Appeals, held that the federal court could order a stay of the action even though it could not compel the arbitration; for the agreement in question, after providing for the arbitration of disputes between the parties, stated:

> "In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York."

To sum up: at present, if parties to an arbitration agreement are so situated that jurisdiction could be obtained only in a federal court, the agreement could not be enforced; the situation is otherwise in those states with statutes similar to that of New York State. A stay could be obtained in a federal court pending submission to arbitration under the state law.

WAIVER OF ARBITRATION

It must be borne in mind that a right to arbitration may be waived, and a party who is interested in enforcing arbitration rights should not take any action inconsistent with such enforcement. For example, in the case of *The Galion Iron Works & Mfg. Co. v. J. D. Adams Manufacturing Co.*, 128 F. 2d 411, 53 USPQ 611 (7th Cir., 1942), plaintiff brought action in the U. S. District Court for the District of Indiana for royalties under a patent license and for judgment on an arbitrator's award. Plaintiff had previously sued defendant and recovered a judgment for royalties, and thereafter asked an arbitrator, pursuant to the terms of the contract between the parties, to ascertain the amount of its alleged liquidated damages suffered by reason of defendant's refusal to pay royalties until compelled to do so under the judgment. Defendant refused to participate in the arbitration and claimed that the award was of no effect. The court held that plaintiff, by bringing suit in the first place, did not see fit originally to avail itself of the remedy of arbitration, and since the defendant had answered on the merits without raising the question of arbitration, the suit had acted as a waiver of the right to arbitrate by both parties. Said the court:

> "Plaintiff could have sought arbitration but it exercised

its option of bringing suit. By its election, it waived its right to arbitration." (53 USPQ, at p. 613).

EFFECTIVENESS OF ARBITRATION CLAUSE IN CONTRACTS INVALID OR OF DOUBTFUL VALIDITY OPEN TO QUESTION

Question as to the effectiveness of an arbitration clause in a contract, where the legality of the entire contract is in doubt, has been raised in *Ring v. Spina,* 148 F. 2d 647, 65 USPQ 65, decided by the Second Circuit in 1945. The contract in this case relating to the production of a play contained an arbitration clause, but the federal court refused to enforce it pending adjudication of the validity of the contract. The court gave as its reason that:

> "No good purpose will be served by forcing the parties to the time and expense of arbitration while this serious question remains unsettled; and serious legal problems may develop if an arbitration is had, and thereafter the contracts are held invalid." (65 USPQ, at p. 72).

This holding is of interest in connection with a recent line of patent decisions (*Sola Electric Co. v. Jefferson Electric Co.,* 317 U.S. 173; *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.,* 329 U.S. 394; *MacGregor v. Westinghouse Electric & Mfg. Co.,* 329 U.S. 420) where the defendant was sued under a license agreement containing price-fixing provisions but was permitted to challenge the validity of the patent upon which the price-fixing was based. By so doing, the defendant made the agreement unenforceable because it was contrary to law. The court in the *Spina* case took note of the decision of the Supreme Court in the *Sola* case, and stated:

> ". . . . it has now been definitely ruled that a licensee under a patent-licensing agreement was not thereby estopped from claiming a violation of the Sherman Act . . . . even though he had made a definite agreement to the contrary." (65 USPQ, at p. 71).

Thus, in patent cases, if an agreement can be challenged as violating the anti-trust laws, or is otherwise held unlawful, a serious doubt is raised as to the effectiveness of arbitration clauses contained in such agreements.

VALIDITY OF PATENT SUBJECT TO CHALLENGE AFTER ARBITRATION HOLDING OF INFRINGEMENT

Another consideration to be borne in mind is the situation brought about by the U. S. Supreme Court's decision in *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.* (329 U.S. 394), *MacGregor v. Westinghouse Electric & Mfg. Co.* (329 U.S. 420), *Sola Electric Co. v. Jefferson Electric Co.* (317 U.S. 173). In these cases, in order to challenge price-fixing arrangements in patent licensing agreements, the licensee, despite long-established precedent to the contrary, has been permitted to attack the validity of the licensed patent—and in the face of express agreement not to do so, as in the *Katzinger* case. Thus, in an arbitration proceeding concerned only with infringement, and not with the question of patent validity, it would seem that the party judged guilty of infringement in the arbitration might subsequently, if sued for infringement, challenge the validity of the patent and thereby render ineffective the finding of infringement in the arbitration proceeding.

Such a situation was involved in the case of *Cavicchi v. Mohawk Mfg. Co., Inc.*, 53 USPQ 543 (D.C.S.D.N.Y.,) (1942). This case held that an award of patent infringement made in an arbitration proceeding, duly confirmed, did not constitute res judicata in a subsequent suit between the same parties for patent infringement. The same parties had previously had an arbitration as to Cavicchi's infringement of Mohawk's patent, and the award of the arbitrator in favor of Mohawk was confirmed by the Supreme Court, New York County, *supra.* Subsequently, Cavicchi brought an action for a declaratory judgment of noninfringement of Mohawk's patents, making no claim of invalidity. Defendant counterclaimed for patent infringement, and plaintiff replied, claiming the patents were invalid. Defendant made a motion for summary judgment on the counterclaim and to strike out plaintiff's reply. The motion for summary judgment dismissing plaintiff's petition was heard by Judge Goddard, who filed an opinion on June 24, 1940 (46 USPQ 371), in which he granted the motion, holding that Cavicchi was estopped to question the fact of his infringement of defendant's patents. The motion to strike out the reply to the counterclaim was heard by Judge Leibell, who stated that

> ". . . . neither the judgment entered on the award of the arbitrator in the State Court proceeding nor the order entered by Judge Goddard dismissing the petition for a declara-

tory judgment in his present action is res adjudicata [sic] or an estoppel or bar to the assertion by plaintiff, in his reply to the counterclaim, that defendant's patent is invalid." (p. 545).

The court did find, however, that Cavicchi was estopped to question the validity of the defendant's patents, not by virtue of the arbitration award, but by reason of an agreement which had been previously entered into between the parties, whereby Cavicchi had sold his half stock interest in defendant company to the defendant and had agreed to recognize the title of the defendant to the patents, not to infringe the patents and to recognize and acquiesce in the validity thereof. The court held that Cavicchi, having received a valuable consideration for his agreement not to contest the validity of defendant's two patents, and having accepted and retained the benefits of the agreement, ought not be permitted to violate his covenant.

In the light of the foregoing, it would appear that, in an arbitration affecting infringement of a patent, there would have to be made some provision for determining the validity of the patent, in order to make the award *res judicata* if the guilty party subsequently infringed the same patent.

ARBITRATION IN INTERFERENCES

Turning to patent controversies relating to contests over priority or originality of invention between several different claimants, it is to be noted that the early patent laws of the United States made provision for the compulsory arbitration of disputed questions arising in the granting of patents.* The present procedure in the Patent Office for the determination of priority between applications relating to the same invention (35 U.S.C.A. §52) is provided for by the Rules of the Patent Office covering interference practice (Rules 93-132). As patent attorneys well know, interference practice is extremely complicated and protracted. There is no present provision in the patent statutes for the arbitration of such contests, and while they are often settled by agreement between the interested parties, the procedure is entirely voluntary and depends wholly upon the attitude of the applicants and/or assignees involved. Rule 107 of the Patent Office Rules makes provision for the manner in which an interference may be terminated other than by prosecuting the inter-

* "Arbitration of Early Patent Disputes" by P. J. Federico, ARBITRATION JOURNAL, Vol. 2 (1938), p. 10.

ference to a decision in the Patent Office, i.e., an applicant or a patentee involved in an interference may at any time file:

(1) a written disclaimer, or
(2) a concession of priority, or
(3) an abandonment of the invention

Upon the filing of such an instrument, judgment is rendered against the party filing it. Rule 125 provides that after an interference is declared, it will not, except as in the rules otherwise provided (such as upon motion to dissolve or failure of one party to proceed), be determined without judgment of priority founded either upon the evidence, or upon a written concession of priority, or upon a written disclaimer of the invention, or upon a written declaration of abandonment of the invention signed by the inventor himself (and by the assignee, if any).

From the foregoing, it would appear that while parties to an interference might agree among themselves to be bound by an arbitration as to priority, the only manner in which the award in the arbitration could be binding on the Patent Office would be the filing, by the party against whom the award is made, of one of the three statements indicated by Rule 107. But such a concession of priority is apparently not binding on the courts, in the light of *United Chromium, Inc. v. General Motors Corporation*, 85 F. (2d) 577, cert. den. 300 U.S. 675. There, one of two interfering applicants had filed a concession of priority, but in a subsequent infringement suit based on the patent issued after the termination of the interference, the court held the patent invalid on the basis of prior invention by the very applicant who had filed the concession of priority. Again, in the case of *Julius Kayser & Company v. Rosedale Knitting Company*, 98 F. 2d 839, 38 USPQ 435, decided by the Circuit Court of Appeals for the Third Circuit, it appeared that there had been an interference between several applicants and a patentee, who had agreed to arbitrate in order to determine the question of priority. In the District Court the defense was set up that the patentee was not the first and original inventor and that the arbitration was not properly conducted. The District Court held:

> "Among rival claimants in an interference proceeding the Patent Office must decide. Concessions and admissions made by litigants, so far as the parties are concerned, are evidentiary between the parties to the interference. If the other interferers concede priority to one, a patent may issue to him. Neither the ruling of the Commissioner nor the admission of the parties, affects others." (33 USPQ, 331.)

On appeal it was held that:

> ". . . . the mode in which the patent issued as between these applicants shows that the usual presumption arising from the grant of a patent does not here arise. Instead of fighting out the question of the priority in the Patent Office, the applicants agreed among themselves to have an arbitration to determine priority, with the evident purpose of forming a patent pool of which the alleged inventors should share." (38 USPQ, 437.)

In referring to the arbitration, the court further stated:

> "In view of the foregoing practices and their undermining the *prima facie* originality of the thus granted patent, we do not deem it necessary to dismiss [*sic*] the facts save to say that even the proposed arbitration was not followed, but the question of priority was decided by the arbitrary action of the pool functioning through designated members." (38 USPQ, 437.)

Recently, a case came before our courts involving the infringement of a reissue patent which had been involved in an interference. Even though the question of priority had been settled by arbitration in the interference, it was nevertheless accepted. The Circuit Court of Appeals for the Seventh Circuit in *Chandler v. Cutler-Hammer, Inc.*, 135 F. (2d) 885; 57 USPQ 438, stated that:

> "Thereupon, by stipulation, the factual question of prior invention was submitted to arbitrators and Chandler prevailed. As a result thereof the reissue patent in suit was issued to Chandler on February 5, 1935."

The court further held that "all the claims relied upon, except one, are valid."

SUMMATION OF SUBSTANTIVE POINTS

Before discussing the mechanics of resorting to arbitration in a given situation, it might be well to summarize the foregoing: Under state arbitration statutes similar to that of New York, agreements to enforce arbitration agreements relating to controversies in connection with agreements involving inventions and patents can be enforced. On the other hand, such agreements cannot be enforced under the present Federal Arbitration Act.

Patent controversies which best lend themselves to settlement by arbitration are those arising out of licensing agreements and the like and out of employer-employee relationships. As to validity and infringement, an arbitration award might be binding as between the parties, but it is doubtful whether an award as to validity could stand up if the patent were challenged in a court action. While the court in the *Zip Mfg. Co.* case, *supra,* was of the opinion that "the determination of the status of a patent, its validity or invalidity, its infringement or non-infringement, is a matter that is inherently unsuited to the procedure of arbitration statutes," it is believed that these questions could be expeditiously and expertly determined by arbitrator specialists in the particular field of patent law involved. However, it must be borne in mind that a patent affects not only private rights but public rights, and while an arbitration settling the question of validity as between the immediate parties to a dispute might be binding on them, it certainly would not bind the public at large.

The granting of a patent has been described as an act of sovereignty and a patent cannot be repealed or revoked, when once issued, except by suit by the United States (*U.S. v. Bell Telephone Co.,* 128 U.S. 315, 363). Furthermore, a patent has been regarded as a contract between the inventor and the government (*Fried. Krupp v. Midvale,* 191 Fed. 588, 594). Because of the public interest in the validity of patents and because of the nature of the patent grant, it seems highly questionable whether the contract between the government and the inventor could be altered in an arbitration proceeding without the presence of both of the parties to the contract. At most, as observed in *U.S. v. Bell Telephone Co., supra,* the result would be conclusive only between the parties to the arbitration. And because of the public interest, it might be considered contrary to public policy to permit validity to be determined, even as between the parties, in an arbitration proceeding. As indicative of the attitude of the patent statutes towards the effect of a validly issued patent, reference is made to Section 4918 of the Revised Statutes (35 U.S.C.A. §66), providing for a suit in equity between interfering patents, i.e., patents claiming the same invention. This section provides that while the court in such a suit may adjudge and declare either or both of the patents involved void in whole or in part, the judgment or adjudication so made shall affect the right only of the parties to the suit and those deriving title under them subsequent to the rendition of the judgment. It would seem clear that no greater effect would be given to a judgment entered upon

an award after an arbitration between interested parties than is permitted by the statute in a situation such as that contemplated in the case of interfering patents.

PROCEDURE

Presentation of Case to Arbitrator or Arbitrators

We turn now to a brief consideration of the practical steps to be followed in a situation where resort is to be had to arbitration. When a dispute arises, the party who wishes to invoke arbitration should give notice, within the time and in the manner specified in the arbitration clause, of his desire to proceed by arbitration. If the clause specifies that the arbitration is to be held under the auspices of a particular organization such as the American Arbitration Association, a letter should be sent to the organization in question, referring to the agreement of arbitration and enclosing a copy, requesting arbitration, and setting forth a brief statement of the controversy which has arisen. Forms for notice and submission of controversies are contained in the "Commercial Arbitration Rules" pamphlet of the American Arbitration Association, as well as in its "Blue Book of American Arbitration." After the arbitrators are named, the latter will determine the time and place of the arbitration, if the parties have not already agreed themselves; or if the arbitration is to proceed in accordance with the rules of some organization, an officer of that organization may well set the time and place of the hearings. The question of the fees of the arbitrators and the manner of payment should be arranged by agreement. In the absence of agreement, the New York statute provides that the fees of the arbitrators shall not exceed those allowed to referees of the N. Y. Supreme Court (see 1457 C.P.A.). Under the United States statute, the arbitrators may charge the reasonable value of their services.

Under the New York Statute, arbitrators must be sworn in the form prescribed by statute. The oath may be administered by a notary public. The United States law does not require an oath of the arbitrators. Under New York law, witnesses may be sworn, but are not required to be. The arbitrators then examine the agreement of the parties to determine what the issues are that are submitted to them. This is very important, as the effectiveness of the entire proceeding may depend upon whether the arbitrators are proceeding in accordance with the agreement or not. Sometimes a party will dispute the authority of the arbi-

trators to pass upon certain questions. For example, in *In re Gray Mfg. Co.*, 64 N.Y. S. 2d 815, 71 USPQ 134, decided Oct. 10, 1946 (N.Y. Sup. Ct., N.Y. Cty.), involved an application to stay an arbitration, which application was denied. The contract involved provided that:

> "Any controversy or claim arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in the highest court of the forum, state or federal, having jurisdiction."

Petitioner made demand for arbitration of certain disputes and respondent answered and also made demand for arbitration of seven stated disputes. Petitioner then moved to exclude two issues: one charging it, as licensee, with refusal to assign patents allegedly based on disclosure to it by licensor; and another charging it with refusing to disclose the contents of a report criticising the patents and patent structure of licensor. The court held the claims cognizable as breaches of faith and within the contract, stating in its opinion:

> "Thus a determination by the arbitrators upon the questions would not be a determination that the issues are within the arbitration clause or amount to a usurpation of the judicial function to construe the submission agreement. Rather it would constitute a finding whether the agreement and the relation which it engendered has been breached in the respects claimed. The agreements provided not only for close cooperation but, in addition, under them petitioner acquired a stock interest in respondent and representation on its board of directors. In short, the contract created a standard of conduct which respondent says was violated. It is for the arbitrators to determine what that standard is and whether it was maintained."

Similarly, in *Kallus v. Ideal Novelty & Toy Co.*, 292 N.Y. 459 (1944), 62 USPQ 32, the New York Court of Appeals reversed the order below (266 App. Div. 607) which had denied a motion for a stay of arbitration. The contract in question was one between an employer and employee, giving the employer exclusive rights under the employee's patents and copyrights during the term of employment. After termination, the employer had the right to continue to manufacture under the license, upon pay-

ment of royalties for a period of time to be arbitrated. The contract expired. Thereafter employee claimed the former employer had violated the provisions of the contract and demanded arbitration of the dispute as to whether he was entitled, for a period of time to be arbitrated, to further royalties. The Court of Appeals stated that the contract gave the employer an election to take a fresh license from the employee at the termination of the contract, and that there was no claim that such election had taken place. The court accordingly held that the employer could not be forced to accept a further license for any period of time, and reversed the order below.

Arbitrators may issue subpœnas to secure the attendance of witnesses or the production of documentary evidence or samples. If the case will warrant the expense, it is desirable to have a stenographic transcript of the arbitration, although the law does not require it. The arbitrators are not bound by legal rules as to evidence and are the sole and final judges of the form in which the evidence shall be accepted. Sometimes the parties agree or they may intend clearly that the arbitrators shall determine the case upon their own investigation or by inspection. Such a situation might be possible in an infringement arbitration, where the arbitrators could decide readily, from a mere inspection of the devices in question, or from inspection plus reference to the prior art and to the claims in the patent, whether infringement exists.

The Award

The final decision of the arbitrators, as to part or all of the dispute submitted to them, is the award. Under the New York statute, a majority of the arbitrators may make the award, unless the agreement of the parties provides otherwise, and the award must be in writing, subscribed by the arbitrators and acknowledged. The award is then delivered to one of the parties or his attorney, or else filed in the court in which judgment is to be entered. It is usual to deliver the original award to the successful party or his attorney, with a copy to the other party, or arbitrators may execute duplicate originals for each party.

If the unsuccessful party to the arbitration refuses to perform the award, the successful party may, within one year after the rendition, make a motion to a court of competent jurisdiction to confirm the award. If the motion is granted, judgment is entered upon the award. This motion is made upon written notice served personally upon the party or his attorney, is supported by affi-

davits showing the rendition of the award and the refusal to perform. If the agreement of the parties specified the court in which judgment was to be entered, the motion is made there. Otherwise it is made in the Supreme Court of the State of New York or in the United States District Court for the district in which the award is made. It should be borne in mind that no motion to confirm can be made under the United States Act or under a submission of an *existing dispute* in New York unless the agreement provided for entry of judgment on the award. In entering judgment, it is necessary to file the submission to arbitration, any appointments of arbitrators, extensions of time within which to make the award, the award itself, the papers used on the motion to confirm, and the order of the court on the motion.

Review of Court Decisions

CIVIL AND COMMERCIAL

Broker's Bought and Sold Notes when retained by party without objection for a reasonable period of time may be considered ratified, equivalent to prior authorization of broker. *J. K. Knitting Mills, Inc. v. Dorgin*, 78 N.Y.S. 2d 488 (App. Div., First Dept.)—*Catz American Sales Corp. v. Holleb & Co.*, 272 App. Div. 689, aff'd by Court of Appeals, N.Y.L.J., June 7, 1948, p. 2119.

Sales Memorandum for the delivery of cotton jersey providing for arbitration under AAA Rules was considered valid agreement to arbitrate since option to terminate ("prices are subject to change without notice") was not exercised. *Art Infant Wear, Inc. v. Turk*, 297 N.Y. 752, affirming 272 App. Div. 138 (see this *Journal* 1947 p. 266).

Cancellation of Contract for sale of cotton does not constitute triable issue of the existence of an arbitration clause when making of contract is not contested (*Aqua Mfg. Co., Inc. v. H. Warshow & Sons, Inc.*, 179 Misc. 949) and arbitration was therefore directed pursuant to sec. 1450 C.P.A. *Nu-Batts Corp. v. M. O. Schimmel Corp.*, N.Y.L.J., May 26, 1948, p. 1977, Walsh, J.

Award under Construction Contract was not confirmed since the building contract entered by the partnership was held invalid due to its failure to comply with California State licensing requirements. Said the Supreme Court of California: "The rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award." *Loving & Evans v. Blick*, 31 Advance Calif. Reports 577, 191 Pacific 2d 445 (see also this *Journal* 1948 p. 57).

Factor to whom seller assigned invoices to secure loan is bound by arbitration clause in seller's agreement with buyer only when the factor has taken any affirmative action to enforce the terms of agreement and thus assumed obligations as well as rights thereunder. *Kaufman v. William Iselin & Co., Inc.*, 272 A.D. 578, 74 N.Y.S. 2d 23.

Stockholders' Agreement providing for arbitration of disputes between stockholders "does not, in words or substance, relate or refer to their fiduciary duties as officers and directors of the corporation" and thus does not prevent a stockholders' and directors' derivative action under Sec. 60 and 61 of General Corporation Law. *Matter of Diamond*, N.Y.L.J., April 7, 1948, p. 1278, Eder, J.

Reference to Rules of National Soybean Processors Association governing the purchase and sale of soybean oil and providing for arbitration constitutes binding agreement of parties and "therefore court must stay procedure in order to permit arbitration," pursuant to sec. 5 U.S. Arbitration Act, *Wilson*

& Co., Inc. v. Fremont Cake & Meal Co., U.S. District Court Nebraska, March 23, 1948, 77 F. Supp. 364.

Restricted Submission as to the determination of commissions does not prejudice the right of either party to arbitrate questions not covered by the submission, especially those subsequently arising. *DeVries v. Parsons & Whittemore, Inc.*, 75 N.Y.S. 597.

Arbitration Clause in Partnership Agreement entitles party to stay of court action or to compel arbitration, but not to dismissal of a complaint for accounting and dissolution of partnership. *Pandolfo v. Gaeta*, 73 N.Y.S. 2d 849.

Distribution of Decedent's Estate was not considered an arbitrable controversy in *Swislocki v. Spiewak*, 273 App. Div. 786, 74 N.Y.S. 2d 147.

Judge is not Disqualified as Arbitrator since Article 6 Section 19 of the New York State Constitution does not specifically disqualify a justice of the Supreme Court from acting as an arbitrator. The case of *MacFadden v. Benvenga*, 290 N.Y. 586, was distinguished since "the bar there is against sitting as a justice and as an arbitrator in the same matter." *Dial Press, Inc. v. Phillips*, N.Y.L.J., May 12, 1948, p. 1776, Koch, J.

Time Limit for Presentation of Claims Within Ten Days "is, in effect, a statute of limitations . . . . and no claim of any kind may thereafter be made by the buyer (*Application of Ketchum & Co., Inc.*, 70 N.Y.S. 2d 476)" who lost his right to demand arbitration. *Raphael v. Silverberg*, N.Y.L.J., April 1, 1948, p. 1193, Eder, J.

"The Right to Name an Arbitrator rests primarily with the parties under their own form of agreement. The power of this court will not be exercised unless it appears that either party has refused to nominate, or that the resignations which created the vacancies are part of a pattern to delay or obstruct arbitration." *Bluhm v. Pereira*, 75 N.Y.S. 2d 170.

Appointment of Arbitrators in accordance with method provided under contract of Dramatists' Guild should be followed even when party joined the Guild after commencement of proceedings for court appointment of arbitrator (thus modifying the decision 73 N.Y.S. 2d 708, digested in this *Journal* 1947 p. 348). *Allen v. Delmar*, 273 App. Div. 762, 75 N.Y.S. 2d 324.

Filing of Objections to arbitrator named by other party cannot be ordered by court within specified time when arbitration agreement in contract for sale of real estate does not provide for such proceedings. *Finlay v. Fitzgerald*, 74 N.Y.S. 2d 544 (App. Div., Third Dept.).

Dismissal of Arbitration Panel on ground that one of the arbitrators had made known his views after the closing of the hearings but in advance of award could not be asked from court since proper method of procedure would be to question award at the time of its confirmation. *Federman v. Farber*, 73 N.Y.S. 682.

Arbitration under Franchise Contracts could not be stayed by bus company which considered resolution of Board of Estimate of the City of New York

concerning suspension of bus operation a cancellation of franchise thus relieving company from complying with arbitration provisions. *North Shore Bus Co., Inc. v. City of New York*, 75 N.Y.S. 2d 372.

Court Directive to Arbitrate not Necessary when rules referred to in arbitration clause provide for method of procedure, the court stating: "The procedure to be followed was to be governed, as the parties established, by the rules of the General Arbitration Council of the Textile Industry." *Roycraft Fabrics, Inc. v. Bra-Nu Brands*, N.Y.L.J., May 26, 1948, p. 1969, Null, J.

Three-Year Statute of Limitation to recover damages for injury to property resulting from negligence (sec. 49(6) C.P.A.) not applicable to arbitration under furniture moving-contract since claim arises from parties' agreement (six-year statute) and not from violation of duty imposed by law. *Kuhnel v. The Three Sofia Brothers*, 190 Misc. 891.

Washington Arbitration Statute of 1943 does not permit an appeal to be taken from an order to proceed with arbitration since it is not a final judgment. Said the Supreme Court of Washington: "An appellate court should not depart from the well-known and established principle of the common law and permit a case to be brought before it piecemeal for review unless clearly authorized to do so by legislative enactment." *All-Rite Contracting Co. v. Omey*, 181 Pacific 2d 636.

Lack of License of Foreign Corporation to do business in New York is no bar to enforce arbitration. The Court of Appeals unanimously affirmed a decision of the Appellate Division to the effect that sec. 218 of N. Y. General Corporation Law which prohibits actions by a foreign corporation upon any contract made by it in this state unless it has obtained a certificate of authority, does not apply to arbitration. Thus unlicensed foreign corporations are allowed the use of state courts to enforce arbitration agreements, contrary to Special Term decisions in *Vanguard Films, Inc. v. Samuel Goldwyn Productions, Inc.*, 188 Misc. 796, and *Levys v. Gentry, Inc.*, 73 N.Y.S. 2d 801. *Tugee Laces, Inc. v. Mary Muffet, Inc.*, N.Y.L.J., April 26, 1948, p. 1535, affirming 75 N.Y.S. 2d 513 which reversed 73 N.Y.S. 2d 803.

Agreement by N. Y. Corporation to Arbitrate in Ohio is enforceable without personal service of process. The important decision of App. Div. Fourth Dept., 271 App. Div. 917, 67 N.Y.S. 2d 669 (digested in this *Journal* 1947 p. 90), was unanimously affirmed by the Court of Appeals. *American Laundry Machinery Company v. Prosperity Company, Inc.*, 297 N.Y. 486, 74 N.E. 2d 188.

Notice of Arbitration Hearing (sec. 1454 C.P.A.) need not be signed personally by arbitrators; acts of agents such as Executive Secretary of Association of Food Distributors are sufficient. *Catz American Sales Corp. v. Holleb & Co.*, 272 App. Div. 689, aff'd by Court of Appeals, N.Y.L.J., June 7, 1948, p. 2119.

Pre-trial Procedures were again considered not available in arbitration under stockholders' agreement for allocation of corporation's real properties. *Flanagan v. Flanagan*, 73 N.Y.S. 2d 267.

Exclusion of Lawyers as representatives of parties was not declared invalid and an award confirmed, the court stating: "While it may be unfortunate

that respondent was obliged to go through the arbitration proceedings without counsel, the arbitration agreement, which included the rules of the tribunal chosen, so provided and respondent was bound thereby." *Seymour Mann, Inc. v. Katzman,* N.Y.L.J., April 23, 1948, p. 1514, Koch, J.

Subpœna has been properly refused when the arbitrators were not shown satisfactorily how the books and records were pertinent and material. There was not misconduct of the arbitrators "in refusing to issue a subpœna for what would have been a fishing excursion." *Knickerbocker Textile Corp. v. Kingsley Fashions, Inc.,* N.Y.L.J., April 5, 1948, p. 1236, Eder, J.

Disregard of Evidence in arbitration under rules of National Federation of Textiles led to vacation of award since it was not final on all issues submitted and thus a violation of the agreement of submission, the court stating: "The submission is the foundation of their (arbitrators') jurisdiction, and they are not the exclusive judges of their own powers (*Halstead v. Seaman,* 82 N.Y. 27)." *Samuel Kirshbaum Fabrics Corp. v. L. & G. Greenfield, Inc.,* N.Y.L.J., April 6, 1948, p. 1256, Eder, J.

Lack of Evidence to support an award is not one of the grounds upon which the court may deny confirmation (*Matter of Everett,* 120 Misc. 349; 198 N.Y.S. 462). *United v. Wendroff,* N.Y.L.J., April 5, 1948, p. 1244, Kleinfield, J.

Conference among Arbitrators after the hearing before making an award rests in the sound discretion of arbitrators just as judges and administrative boards "promptly decide matters before them without any lengthy conference or discussion where, in their judgment, the proper decision is obvious to them. Without such latitude, the administration of justice would be unnecessarily delayed." Thus, an award, challenged on the ground that two of the arbitrators refused to adequately discuss evidence with third arbitrator, was confirmed. *Stecklow Bros., Inc. v. Carol Management Corp.,* 78 N.Y.S. 2d 427; aff'd N.Y.L.J., May 11, 1948, p. 1765 (App. Div., 2d Dept.).

Legal Effects of Alleged Non-Delivery of Merchandise are "properly within the submission for the arbitrators to decide." The objection to the award that it was contrary to the evidence before the arbitrators is "a question on which the court cannot pass." *Brenda Modes, Inc. v. Arcola Fabrics Corp.,* 273 App. Div. 891, 78 N.Y.S. 2d 46.

Third party not bound by judgment entered upon fair rental award (*Dixon v. Talerico,* 217 App. Div. 191), but for same reason such party is also not entitled to move to set aside award. *Barnum v. Rome,* 74 N.Y.S. 2d 860; *Romanoff v. Nilow Realty Corp.,* 75 N.Y.S. 2d 666 (App. Div., 2d Dept.).

Issuance of injunction against landlord does not violate statutory provision regarding effect of judgment entered upon an award (sec. 1466 C.P.A.) but landlord is entitled to further security as condition of granting an injunction. *Edythe Nelson, Inc. v. 500 Fifth Avenue, Inc.,* 70 N.Y.S. 2d 906.

Recovery of Money Determined in Certain Percentages of funds received does not prevent award from being final. Said the court: "Such an award is final in the sense that an interlocutory judgment is final in a foreclosure or

accounting action. All that remains to be done is the performance of the ministerial act of computing the percentages." The award was confirmed and a referee appointed pursuant to Sec. 1467 C.P.A. *Hunter v. Prosser*, N.Y.L.J., May 4, 1948, p. 1660, Null, J.

Time Limit of Three Months for vacating award under sec. 1463 C.P.A. is "a statute of limitations and may not be disregarded (*Bond v. Shubert*, 264 App. Div. 484, aff'd 290 N.Y. 901)." *Am. Veterans' Committee v. Omaha Estates, Inc.*, N.Y.L.J., April 19, 1948, p. 1443, Eder, J.; *43d St. Cafe, Inc. v. Volga Estates, Inc.*, N.Y.L.J., June 2, 1948, p. 2056, Pecora, J.

Dissatisfaction with award does not warrant remission of case. In an arbitration under a submission to recover for damages arising from the fall of a bus into the Passaic River, the Supreme Court of New Jersey confirmed the award in holding: "Ordinarily, a mistake or error of law or fact is not fatal unless there is a resulting failure of intent or the error is so gross as to suggest fraud or misconduct. Every intendment is indulged in favor of the award; and it is subject to impeachment only in a clear case. In the absence of misconduct or want of good faith on the part of the arbitrator, the mere fact that the award seems excessive or inadequate is not sufficient to warrant judicial interference." *Held v. Comfort Bus Line, Inc.*, 57 A. 2d 20.

No Consideration as to the basis of arbitrators' award will be given by courts. This rule was again maintained on motion for reargument by the Court of Appeals, holding that "Since the award might have rested on a ground which the arbitrators were competent to consider, other than that of fraud there was 'no warrant for an inference of usurpation of power by them or other abuse of their office.'" *Behrens v. Feuerring*, 297 N.Y. 472, 74 N.E. 2d 180.

Majority Award on the operation of a milk route was not invalid by reason of its determination that in the event the Supreme Court, on application to confirm the award, should determine that there was an error as to the inclusion of plant improvements in the award, then a lesser sum should be awarded (see *Application of Davis*, 57 N.Y.S. 2d 387). *Delaware County Dairies, Inc. v. White*, 75 N.Y.S. 2d 434.

Fair Rental Awards. Parties to an arbitration to fix the rent or commercial space may not waive the provision of the Emergency Rent Law that no person shall act as arbitrator who directly or indirectly in any way is connected or associated in interest with either party. *Amfo Realty Corp. v. Triad Portable Case Corp.*, 72 N.Y.S. 326 (App. Term, First Dept.). When arbitration is purely pro forma and rent in excess of emergency rent is by consent of the parties, award has to be vacated as being a violation of the Business Rent Law (Chapter 314 of the Laws of New York of 1945, as amended). *Viro Realty Corp. v. Belmont*, 297 N.Y. 871, affirming 272 App. Div. 1014.

MANAGEMENT AND LABOR

Arbitration of Disputes under Fair Labor Standard Act may not be compelled under U. S. Arbitration Act. "In granting a stay of proceedings the jurisdiction of the (federal) court is not limited to those situations wherein it may compel arbitration. . . . . Arbitration in accordance with collective bargaining agreements of disputes arising under the Fair Labor Standard

Act may not be compelled under the U. S. Arbitration Act in absence of showing that the contract involves interstate or foreign commerce. Such situation differs from a mere stay of proceedings under Sec. 3 of U. S. Arbitration Act." *Camiano v. Rifkin*, U. S. District Court, Southern Dis., N. Y., March 11, 1948, 77 F. Supp. 363.

General Wage Increases are not arbitrable issues when the collective bargaining agreement provides for grievance procedure and arbitration only with regard to working conditions of employment and merit wage increases for employees. The Supreme Court of New Jersey therefore held that since the parties had reduced their differences to written agreement, "we will not vary the terms thereof and in effect write a new contract for them." *United Electrical, Radio & Machine Workers of America, C.I.O., Tool, Diemakers & Machinists Local No. 420 v. Walter Kidde & Co., Inc.*, 57 Atlantic 2d 54.

Controversies Arising after Expiration of collective bargaining agreement are not arbitrable notwithstanding non-compliance with directions of Labor-Management Relations Act of 1947 (Taft-Hartley Law) for timely notice of termination, since such Act does not prolong agreement in event of failure to comply with its requirements. *In re Eisen*, 77 N.Y.S. 2d 676.

Arbitrability of Revision of Wage Scales under general arbitration clause must be determined by court when collective bargaining agreement authorizes either party to reopen question of wage scale for appropriate revision in event cost of living standard showed substantial increase, since such provision "evidences their intention not to have arbitration in such event, and that the inability of the parties to negotiate a revision of wage scales does not create an arbitrable dispute under the agreement." *Ford Instrument Co., Inc. v. Dillon*, 77 N.Y.S. 2d 72.

Closed Shop Clause in collective bargaining agreement challenged as void in not coming within exception of National Labor Relations Act, justifies stay of arbitration since "the court will not compel the arbitration of controversies arising out of void provisions in an agreement (*Matter of Kramer & Uchitelle, Inc.*, 288 N.Y. 467; *Sanders v. M. Lowenstein & Sons, Inc.*, 289 N.Y. 702)." *Harold Levinsohn Corp. v. Joint Board of Cloak, Suit, Skirt and Reefer Makers' Union*, 78 N.Y.S. 2d 171 (App. Div., First Dept.).

Violation of Collective Bargaining Agreement by employer is a question for the arbitrator under a clause providing for arbitration of all disputes, when strike may be declared only "in the event of any violation of this agreement." Said the court: "This clause cannot be construed to give the respondent the right to declare unilaterally that there has been a violation of the agreement by the petitioner, and thus automatically invoke the right to strike. If there is a determination of a violation, then that right comes into being. Otherwise, the collective agreement would afford no protection to the petitioner." Thus, a motion of the Union to stay arbitration was denied. *Fields Baking Corp. v. Bakery & Pastry Drivers and Helpers Union, Local 802, International Brotherhood of Teamsters, A. F. of L.*, 73 N.Y.S. 2d 518.

Reduction of Salary of reinstated employee may be arbitrable issue. By an arbitration award under a general arbitration clause, a discharged employee was reinstated to his former position without loss of seniority, but he was

advised that his salary would henceforth be reduced. On refusal to rescind the wage reduction, a lawsuit was instituted to recover wages for the period since the reemployment. The Union contended there was no basis for arbitration as the reinstated employee became entitled to the wages he received while in his former position prior to his unjustified discharge. The employer, however, claimed such right to reduction was not before the arbitrator when the discharge for cause was the sole issue. The court considered this dispute clearly within the terms of the contract whereby an employer may rightfully require an employee to arbitrate the question as to whether his salary was wrongfully reduced after his reinstatement pursuant to the arbitration award. *Miroflex Products Co., Inc. v. Rosenthal,* N.Y.L.J., April 2, 1948, p. 1214, Eder, J.

Discharge Right Reserved to Employer to discontinue operations without speed-up of remaining employees provided those laid off would have first opportunity at any jobs they could handle, would be final and not covered by arbitration clause as to disputes of contract interpretation. *Twentieth-Century-Fox Film Corporation v. Screen Publicists' Guild, Local No. 114, CIO,* 78 N.Y.S. 2d 178.

Violation of No-Strike Provision Does not Constitute Arbitrable Issue. A contract provided that "during the life of this agreement, the company agrees that there shall be no lock-outs and the Union agrees that it will not cause or permit its members to cause nor will any member of the Union take part in any strike or stoppage of work. It is understood and agreed that the grievance procedure provided in this Article shall be the only method for settling disputes which are the subject of this agreement." The purpose of the article was to prevent a strike and clearly not to arbitrate after it occurred, contrary to the express provisions of the contract. *Colonial Hardwood Flooring Co., Inc. v. International Union United Furniture Workers of America,* U. S. District Court Maryland, February 16, 1948, 16 U.S. Law Week p. 2414, aff'd by U. S. Circuit Court of Appeal, 4th Circ., May 3, 1948, 168 F. 2d 33.

Reopening of Wage Provision upon thirty day notice was considered "insufficient to justify a directive to arbitrate wages under a general arbitration clause not specifically providing for arbitration of the wages upon reopening of that question (*International Ass'n of Machinists v. Cutler-Hammer, Inc.,* 271 App. Div. 917, aff'd 297 N.Y. 519; *Vasek v. Matthews, Inc.,* N.Y.L.J., November 5, 1947, p. 1175)." *McCarten v. Brooklyn Bridge Freezing and Cold Storage Co., Inc.,* N.Y.L.J., April 13, 1948, p. 1359, Koch, J.

Arbitrability of Discharges is denied when under collective bargaining agreement only disputes involving its application or interpretation are subject to arbitration. *General Electric Co. v. United Electrical, Radio & Machine Workers of America,* N.Y.L.J., April 7, 1948, p. 1278, Eder, J.

Discontinuance of Wire Music Programming Department of World Broadcasting System and arrangement to have such work performed through independent contractors are not arbitrable controversies under collective bargaining agreement authorizing arbitration of discharges and layoffs, in absence of proof that station was not acting in good faith. *Application of Berger,* 78 N.Y.S. 2d 528.

Veterans were denied vacation compensation under reemployment provisions of Selective Service Act. The court did not pass upon the question of compensation under collective bargaining agreement providing for arbitration, since the question of proper interpretation of that agreement was left to the arbitration tribunal. *Woods v. Glen Alden Coal Co.*, 73 F. Supp. 871 (U. S. District Court, Pennsylvania).

Election of Employer Representatives to administer employees' security fund pursuant to art. 302(c) Labor Management Relations Act of 1947 (Taft-Hartley Law) involved an arbitrable issue as to whether the union breached the agreement by prescribing a plan for such designation by secret ballots. The employer, however, is not entitled to injunction staying further action until the arbitration is completed since art. 84 C.P.A. (N. Y. Arbitration Statute) does not permit a court to restrain any party from doing acts in connection with the subject matter of a pending arbitration. *Association of Uptown Converters, Inc. v. Wholesale and Warehouse Workers Union, Local 65, C.I.O.*, 190 Misc. 919, 75 N.Y.S. 2d 468.

Difficulty in Determining the Amount of Damages sustained by the members of the Union as stated by the arbitrator "is in no sense tantamount to a confession that he had no basis for his award." Since the arbitrator did not act capriciously in making his award, it was confirmed. *In re Angelos*, N.Y.L.J., April 5, 1948, p. 1236, Null, J.

Pension Plan for Employees "during their lives," as directed by arbitral award, providing payments for life for all employees becoming entitled thereto during period of employment contract, and not merely payments to eligible employees during contract period, was maintained by New York courts in *New York City Omnibus Corp. v. Quill, President of Transport Workers Union of America, CIO*, 297 N.Y. 832, affirming 272 App. Div. 1015, affirming 189 Misc. 892.

Revised Schedule of Minimum Wages involving third parties cannot be substituted in award which thus would not be a definite and final award (art. 1462(4) C.P.A.). Such reference justifies remittance to same arbitrator to clarify his award. *Brooklyn Daily Eagle, Inc. v. MacManus*, 72 N.Y.S. 2d 436 (App. Div., 2d Dept.).

Refusal of Adjournment by arbitrator is a good cause for vacating award when a request of the company was based on sufficient reason and offered at the proper time. *Stein v. Milk Drivers and Dairy Employees of New Jersey, Local 680*, 56 Atlantic 2d 715 (Court of Chancery of New Jersey).

Amendment to New York Arbitration Statute. N. Y. Civil Practice Act Sec. 1458 subdiv. 2 was amended by Chapter 425 of the Laws of 1948, in adding at the very end the sentence: "Any party may, on or before the return date of the notice of application, demand a jury trial of such issue." The meaning of the amendment, effective September 1, 1948, is that a jury trial of the preliminary issue of the existence of an arbitration agreement may be had on request of either party and not only on the demand of the party who raises the issue. The new provision corresponds to a similar provision in Section 1450 (remedy in case of default).

Publications

Conciliation and Arbitration is a symposium of various articles in the April 1948 issue of Industrial and Labor Relations Review, the new quarterly of the New York State School of Industrial and Labor Relations, Cornell University. An article by Harold W. Davey deals with "Hazards in Labor Arbitration"; Irving Bernstein reports on "Recent Legislative Developments Affecting Mediation and Arbitration," and John Atherton Flexner discusses questions of "Arbitration of Labor Disputes in Great Britain." . . . *A Symposium on Arbitration* constitutes the April 1948 issue of the Missouri Law Review. Kenneth S. Carlston deals with "International Arbitration in the Post-War World," J. Noble Braden with "Problems in Labor Arbitration" (a reprint is available from AAA). "Arbitration in Missouri" is dealt with by David R. Hensley whereas H. H. Nordlinger discusses "The Law and Practice of Arbitration in New York." . . . *"The Arbitration Award and the Non-Resident: Nuance in New York"* is the title of a well documented article by Tobias Weiss which appeared in the April issue of Columbia Law Review; Walter J. Derenberg contributed to the 1946-1947 Survey of New York Law with an article on *"Commercial Arbitration"* in New York University Law Quarterly Review, Volume XXII, page 909. . . . Amendments to the *North Carolina Act* establishing an arbitration service in the Department of Labor are considered in a note in North Carolina Law Review vol. 25 p. 446. . . . *The Voluntary Arbitration of Labor Disputes* is the title of an article by Nathaniel H. Janes in N. Y. Law Journal vol. 119 nos. 70-73 (April 12-15, 1948); nos. 92 and 93 (May 12-13, 1948) included an article by Jules J. Justin *"Arbitration-Related Rules of Evidence and Procedure."* . . . A revised edition of *"Toward Effective Arbitration,"* by J. Noble Braden, is available from AAA.

Private Investment in a Controlled Economy. Germany 1933-1939, by Samuel Lurie, New York: Columbia University Press, 1947, 243 pp., $3.00. Encouragement and protection of American private investments abroad will be one of the major issues to be faced in the general program of economic recovery and aid all over the world. Though confined to the pre-war period in Germany, the comprehensive survey refers to many state-controlled situations which will have to be considered too in many other countries.

Library of World Affairs. Among the valuable publications published under the auspices of the London Institute there should be mentioned the second edition of the editors' book: *Making International Law Work,* by George W. Keeton and Georg Schwarzenberger, London, Stevens & Sons, 1946, 266 pp., 12s6d; the interesting booklet on *The Crisis in the Law of Nations,* by H. A. Smith, 1947, 102 pp., 7s6d, the recent stimulating booklet by J. E. Tyler on *Great Britain, The United States and The Future* (1947, 130 pp., 8s), and the well-documented most timely book on *Czechoslovakia between East and West,* by William Diamond (1947, 258 pp., 12s6d).

Documentation

INTERNATIONAL ORGANIZATION OF AMERICAN STATES

The Charter of the Organization of American States as agreed upon at the recent Ninth International Conference of American States at Bogota [1] provides in Chapter IV: *Pacific Settlement of Disputes* the following:

ARTICLE 20

All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council of the United Nations.

ARTICLE 21

The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time.

ARTICLE 22

In the event that a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the Parties shall agree on some other peaceful procedure that will enable them to reach a solution.

ARTICLE 23

A special treaty will establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definite settlement within a reasonable period.

The Treaty mentioned in art. 23, *The Pact of Bogota* of April 30, 1948 deals in 59 articles with the pacific settlement of disputes and devotes Chapter V (art. 38-49) to "Procedure of Arbitration."

The *Economic Agreement of Bogota* signed at the same Conference on May 2, 1948, provides in its Chapter XI: *Adjustment of Economic Disputes* the following:

The States agree, individually and collectively, to resort only to orderly and amicable means in the settling of all economic differences or disputes between them. They agree, when such controversies arise, to enter into consultations through diplomatic channels for the purpose

[1] For text, see Dept. State Bull. vol. 18 p. 666; for Draft-Provisions as to the settlement of disputes, this Journal 1948 p. 21.

of reaching a mutually satisfactory solution. If such consultations prove ineffective, any State that is a party to the controversy may request the Council for the purpose of facilitating an amicable settlement of the controversy between the parties.

If necessary, the States shall submit the solution of economic disputes or controversies to the procedure set forth in the Inter-American Peace System or to other procedures set forth in agreements already in existence or which may be concluded in the future.

Intergovernmental Maritime Consultative Organization, recently set up by the United Nations Maritime Conference in Geneva, will deal with technical and economic problems existing or expected to arise in the fields of maritime transport and communication. The Convention [2] of March 6, 1948 provides in Part XV: *Interpretation* the following:

ARTICLE 55

Any question or dispute concerning the interpretation or application of the Convention shall be referred for settlement to the Assembly, or shall be settled in such other manner as the parties to the dispute agree. Nothing in this Article shall preclude the Council or the Maritime Safety Committee from settling any such question or dispute that may arise during the exercise of their functions.

ARTICLE 56

Any legal question which cannot be settled as provided in Article 55 shall be referred by the Organization to the International Court of Justice for an advisory opinion in accordance with Article 96 of the Charter of the United Nations.

AIR TRANSPORT AGREEMENTS

The Air Transport Agreement between the Governments of the United States and Italy of February 6, 1948,[3] provides in Article 12 for advisory reports of an arbitration tribunal to be constituted ad hoc within the framework of the International Civil Aviation Organization, as follows:

Except as otherwise provided in the present Agreement or its Annex, any dispute between the contracting parties relative to the interpretation or application of the present Agreement or its Annex, which cannot be settled through consultation, shall be submitted for an advisory report to a tribunal of three arbitrators, one to be named by each contracting party, and the third to be agreed upon by the two arbitrators so chosen, provided that such third arbitrator shall not be a national of either contracting party.

Each of the contracting parties shall designate an arbitrator within two months of the date of delivery by either party to the other party of

[2] For text see Dept. State Bull. vol. 18 p. 499.

[3] Text in: Documents & State Papers (U. S. Department of State) vol. 1 p. 112.

a diplomatic note requesting arbitration of a dispute; and the third arbitrator shall be agreed upon within one month after such period of two months. If the third arbitrator is not agreed upon, within the time limitation indicated, the vacancy thereby created shall be filled by the appointment of a person, designated by the President of the Council of the International Civil Aviation Organization, from a panel of arbitral personnel maintained in accordance with the practice of the International Civil Aviation Organization. The executive authorities of the contracting parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report. A moiety of the expenses of the arbitral tribunal shall be borne by each party.